B

REPORT

of

COMMITTEE ON THESIS

THE undersigned, acting as a committee of the Graduate School, have read the accompanying thesis submitted by Ivan O. Hansen for the degree of Master of Arts. They approve it as a thesis meeting the requirements of the Graduate School of the University of Minnesota, and recommend that it be accepted in partial fulfillment of the requirements for the degree of Master of Arts.

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PREFACE.

It would hardly seem fair to write such a paper without acknowledging one's indebtedness to particular articles used to a great extent. The writer is particularly indebted to an article by Professor William Corey Jones, of the University of California Law School dealing with "Municipal Affairs" in the California Constitution, in Volume I. of the California Law Review. This article was discovered after the material for this paper had been written up, but it was invaluable as showing the form in which to put the material.

A review of cases by R.W. M., in the same volume of the Review was drawn on freely in connection with the decisions on section 19, Article XI.

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June 1, 1915. Minneapolis, Minn.

LEGISLATIVE CONTROL OF CITIES IN CALIFORNIA WITH SPECIAL REFERENCE TO THE CITIES OPERATING UNDER A FREEHOLDERS' CHARTER

A thesis submitted to the Faculty of the Graduate School of the University of Minnesota in partial fulfilment of the requirements for the Degree of Masters of Arts

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I. EARLY STRUGGLES FOR HOME RULE IN CALIFORNIA.

A. Conditions Prior to the Convention.

The discovery of gold and the adoption of a constitution for the new state of California were almost simultaneous.(1)

Only shortly before this, California had been a part of Mexico. During the then recent war, California had been torn from the weakened grasp of Mexico by a military expedition led by Fremont, Stockton, and others.

California remained under military government up to the time of her admission as a state, never passing through the territorial stage.

The first constitutional convention met at Monterey, September 1, 1849.(2) The new constitution was adopted October 10, and ratified by the people November 13, 1849. Without waiting for congressional action, -- the need was too pressing, -- the state government was organized, and order began to replace lawlessness. Congress tardily recognized the state government by voting for ad-

1. Bancroft, History of the Pacific States of North America. XVII., 256.

2. Ibid., XVII., 287.

mission, as a free state, September 7, 1850.

The paramount importance of the city in California made very desirable constitutional provisions of the most enlightened sort. Yet, influenced by the examples of other state constitutions, and working at a time prior to the beginning of constitutional checks upon special municipal legislation, the convention made the same mistakes that characterized the state constitutions as a whole.

The provisions which follow indicate the weakness of the Constitution on this point:

"Article IV., Section 36 - Corporations may be formed under general laws, but shall not be created by special laws except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed."

"Article IV., Section 37 - It shall be the duty of the legislature to provide for the incorporation of cities and incorporated villages, and to restrict their powers of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in

assessments and in contracting debts by such municipal corporations."

"Article XI., Miscellaneous.

Section 6 - All officers whose election or appointment is not otherwise provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be selected by the people, or appointed as the legislature may direct."

A more complete legislative control over cities than that permitted by these provisions could hardly be imagined. Yet, such provisions were typical of those the country over. Bancroft remarks upon the "slavish" copying of the constitutions of New York and Iowa.(1) Whatever the sources, such were the constitutional handicaps under which municipalities developed in California prior to the Constitution of 1879. California, it must be remembered, had just been subjugated; the population of the state was composed of disgruntled Mexicans, Indians, and adventurers of every sort. Military rule prevailed up to the time of the adoption of the constitution. The

1. Bancroft, Pacific States, XVII., 296.

discovery of gold, and easily gained wealth, brought with it a low moral tone -- the population was honeycombed with a vicious element.

San Francisco, at this time, was a city of some 30, 000 souls, at those times of the year when the miners were not at their "diggings."(1) The worst of the vicious flocked to this metropolis of the Pacific Coast -- this entrepot of western commerce. Corruption was one of the lesser evils. In 1851, San Francisco received a new charter which placed a wholesome check on financial extravagance.(2) The city soon fell into the hands of political demagogues from Tammany Hall, New York. Crime and corruption led, in 1856, to the Consolidation Act,(3) the chief aim of which was municipal retrenchment by merging the double city and county governments into one.(4) Each succeeding year, however, brought greater legislative interference through special acts, though the legislature needed very little incentive to exercise its powers. Other cities had sprung up and were growing to prominence. They, too, began to feel the hand of the legislature heavy upon them. The result was a clearer

1. Bancroft, Pacific States, XVII., 168, Note 14.
2. Ibid., XVII., 760, Note 10, see pp. 760-768 for corruption in city adminstration.
3. California Statutes, (1856), 145 et seq.
4. Bancroft, Pacific States, XVII., 768.

recognition of the deficiencies of the "municipal" provisions in the constitution, and a growing desire for a larger measure of local control. No doubt the provisions of the Missouri constitution of 1875 had come to the attention of many.

As might be expected, San Francisco was the seat of most of the agitation for a new constitution. It was here that the greatest inequalities in wealth were to be observed. Here, too, was the home of the "workingmen's party," which had been organized as a means of protesting, politically, against the abuses in regard to taxation and general labor conditions.

The reasons why a new constitution was sought are too many to be related in this paper.(1) Bancroft says : "To sum up in one all the counts against the constitution, as experience revealed the defects of the case was this:that the whole political duty of the people under it was to vote into place men who would legislate away their substance -- the constitution gave them no remedy."(2) It must be kept in mind that the legislature was composed of

1. Bancroft, Pacific States, XVIII., 370-373.

2. Ibid., XVIII., 371.

just the same sort of men, to a large extent, that ruled the cities.

The legislature of 1875-1876, appropriated $150,000 for convention purposes; ordered a special election to choose delegates, and another for a vote on the adoption or rejection of the constitution, when framed.(1) At the election of delegates, of which there were 152, the "workingman's party" carried the city and county of San Francisco with 50 delegates. The non-partisans carried the rest of the state with 85. The Republicans secured eight, and the Democrats seven.

The majority of the San Francisco delegation, which contained the principal framers of the municipal provisions, were Irish and Germans, small tradesmen for the most part.(2) They were just about the sort of men one would expect to see elected, bearing in mind the conditions in California at the time, and the fact that they represented the "workingmen's party." A small number were lawyers and editors.(3) From this group was drawn the man who introduced the home rule provision, Judge Hager.

1. Bancroft, Pacific States, XVIII., 373.
2. Ibid., XVIII., 402-406, Note 46.
3. Debates and Proceedings of the Constitutional Convention of the State of California. (1878-9). 1406.

An interesting fact in connection with the election is disclosed in the debates of the convention. Judge Hager, speaking in defense of the freeholders' provision, which he introduced, said: "It is the policy now to give the people more direct control, and take away from the legislature the power to pass special laws. That is the platform on which we of San Francisco were elected."(1) Here we have the keynote of the convention -- freedom from "special legislation." And , no part of the state had suffered so severely as the cities. San Francisco in particular had been singled out.

B. THE CONVENTION.

The convention met at Sacramento, the capital of the state, Saturday, Sept. 28, 1878, and continued in session for 156 working days. Joseph P. Hoge, of San Francisco, was chosen chairman.

On Tuesday, October 8th, the chairman of the convention announced the composition of the committee on City, County, and Township Organization. It included Judge Hager, chairman, Fawcett, McFarland, Barbour, Hall,

1. Debates and Proceedings, 106.

Schell, Tinnin, Reddy, Rolfe, Barnes, Holmes, Mills, McCallum, and Freeman.[1]

Propositions for the amendment of sections 31 and 37, of Article IV., of the Constitution of 1849, began pouring in immediately. These proposed amendments ranged in character from a practical substitution of the old provisions, and prohibitions on further special legislation regarding municipal matters, to the freeholders' charter provision submitted by Judge Hager. At the same time, these proposals attested the importance of the subject, and the inability of the proposers, as a whole, to grasp the opportunity to free the cities, once and for all, from legislative interference in local matters.

An examination of these proposed amendments simply serves to accentuate the invaluable services of Judge Hager. None of the other delegates had gone further than a proposed inhibition of special legislation.

1. EARLY PROPOSALS FOR AMENDMENT.

A few of these proposals may be noted to

1. Debates and Proceeding, Oct. 8, 1898.

indicate the advanced position taken by Judge Hager. They will also serve to indicate, at least partially, the opposition he was forced to overcome.

October 10th, Mr. White proposed a number of restrictions on the legislature.(1) Sections 50 and 56 will be found to be exact copies of sections 31 and 37, Article IV., of the old constitution.

The following day, October 11th, Mr. Laine proposed a series of amendments of Article IV., of the existing constitution. Section 29 reads as follows:

"No local law shall be passed unless notice of the intention to propose the same to the legislature shall have been published in the locality to be affected thereby, which notice shall state the substance of the contemplated law, and shall be published at least 20 days in some newspaper of general circulation, in the locality to be affected, prior to its introduction into the legislature. The evidence shall be exhibited to the legislature before such act shall be passed.(2) Sections 31 and 37 were exactly

1. Debates and Proceedings, 106.
2. Ibid., 114.

the same as the corresponding sections in the old constitution. The proposer of these amendments merely desired a per functory safeguard thrown about the municipalities against the gravest abuses of special legislation. The special legislation, however, against which the new constitution was to be aimed, would still remain.

A complete constitution was introduced, October 14th, by Mr. McConnell.(1) Article IX., related to municipal corporations,(2) but dealt largely with uniformity of legislative action concerning municipalities, and fiscal matters, such as limitat ions of municipal indebtedness. Section 30 of the article on the legislative department provided against special legislation, prohibiting, among other things, "regulating the affairs of counties, townships, road and school districts, " in this manner.(3)

Many other provisions were introduced. Some were aimed at special legislation. More dealt with control over municipal officers and their election or appointment. The majority provided against municipal over-indebtedness, and, inhibited legislative sanction of the same.

1. Debates and Proceedings, 129.
2. Ibid.,133.
3. Ibid., 131.

2. THE FREEHOLDERS' PLAN IS PROPOSED.

October 26th, Mr. Hager proposed an article to replace the provision then in the constitution relating to municipal corporations.[1] Section 8 corresponds to the present section 6 as it stood prior to the amendment of 1896. The freeholders' charter provision appeared as Section 10, and was introduced in blank. That is, only the first few words were read, in order to give the title of the section, so to speak.

Some days later, November 8th, the section was introduced in full, and referred to committee.[2] It did not appear again until the report of the Committee on Cities, Counties, and Townships was made, December 17th.[3] The report was read and ordered placed on the General File. That considerable opposition to the proposal had developed in committee is evidenced by the note attached to the report, signed by Judge Hager. The note read: "The propositions relating to cities having more than 100,000 population being only applicable to the city and county of San Francisco, are reported by the committee

1. Debates and Proceedings, 221-222.
2. Ibid.,340. The first line reads: "Any city may frame a charter, etc."
3. Ibid.,824. The committee, it will be noticed, had reworded the first line so as to read: "Any city having a population of more than 100,000 inhabitants, may, etc."

for the consideration of the convention, with the understanding that each member of the committee is free to vote for or against the same."

As reported out of committee, the freeholders' charter plan is designated as section 9 of the article on Cities, Counties, and Townships. It is given here in full:

"Any city having a population of more than 100,000 inhabitants, may frame a charter for its own government, consistent with and subject to the constitution and laws of this state, by causing a board of 15 freeholders, who shall have been for at least five years qualified electors thereof, to be elected by the qualified electors of such city at any general or special election, whose duty it shall be, within 90 days after such election, to prepare and propose a charter for such city, which shall be signed in duplicate by the members of such board, or a majority of them, and returned, one copy thereof to the Mayor or other chief executive officer of such city, and the other to the Recorder of Deeds of the county. Such proposed charter shall then be published in two daily

papers of largest (1) circulation in such city for at least 20 days, and within not less than 30 days after such publication it shall be submitted to the qualified electors of such city, at a general or special election, and if a majority of such qualified electors voting thereat shall ratify the same, it shall at the end of 60 days thereafter become the charter of such city, or if such city be consolidated with a county in government, then of such city and county, and shall become the organic law thereof, and supersede any existing charter and all amendments thereof, an d all special laws inconsistent with such charter. A copy of such charter, certified by the Mayor or chief executive officer and authenticated by the seal of such city, setting forth the submission of such charter to the electors, and its ratification by them, shall be made in duplicate and deposited, one with the Secretary of State, the other in the office of the Recorder of Deeds of the county, among the archives of the city, and thereafter all courts shall take judicial notice thereof. The charter so ratified may be amended at intervals of not

1. The Committee on Revision changed the reading from "largest" to "general", and thus it appears in the completed constitution.

less than two years, by proposals therefor, submitted by the legislative authority of the city to the qualified voters thereof, at a general or special election held at least 60 days after the publication of such proposals, and ratified by at least 3/5 of the qualified electors voting thereat. In submitting any such charter, or amendment thereto, any alternative article or proposition may be presented for the choice of the voters, and may be voted upon separately without prejudice to others."

3. THE DEBATE ON SECTION 9.

On January 16, 1879,(1) the report of the Committee on City, County and Township Organization was taken up for consideration in the convention sitting as a Committee of the Whole. Section 9 was temporarily passed, pending the arrival of Judge Hager, who was absent in San Francisco. On the following day Mr. Hager returned, and the first debate on section 9 ensued.(2)

A running account of the debate which took place on the freeholders' charter provision will be interesting for several reasons. First, it will show how the conven-

1. Debates and Proceedings, 1039.
2. Ibid., 1053.

tion feared and was jealous of added power for San Francisco, and , second, it will reveal the manner in which this fear and jealously crystallized in the final wording of the provision. After the provision had been read, Mr. Moreland opened the fight by a motion to strike out the section which now appeared as section 9.(1)

Mr. Hager immediately arose to the defence of his proposition:

"The members of the Convention will observe that this is proposed for the formation of a charter, by the people, subordinate to the constitution and the laws of the State. We have already adopted a provision that the legislature may by general law, provide for the incorporation of cities. Now, then, any charter that may be formed will be subordinate to these general laws, but it will be shaped by the people, and submitted to the people, and ratified and adopted by them. That has been the custom all over the world. In San Francisco we used to adopt our charter, submit it to the people, the legislature would ratify it, and it became a charter. Now it is

1. Debates and Proceedings, 1059.

proposed that in a city parties may be selected for the purpose of framing a charter, just as we have done heretofore in San Francisco, and when it has been framed it has to be submitted to the people, and has to be ratified by them; but it must be subordinate to the constitution , and subordinate to general law. Now, then, if the city of San Francisco should undertake to frame a charter, it should not be submitted to the legislature, because we have taken that power away from the legislature and instead of that we substitute a general law; therefore it must be in subordination to the general law as the only authority that controls the matter. In former years, when San Francisco was not a consolidated government, we had some four or five charters. There was a convention to frame a charter, and when the charter was ratified by the people and sanctioned by the legislature, it became the charter of the people. Now, the legislature, under a general law, may authorize any city to frame a charter. Under section 6, that we have passed, the legislature by a general law may authorize any city in the state to frame a

charter, if it is in subordination to the constitution and general law.

Mr. Moreland here asked the use of the Section 9.

Mr. Hager answered:-

"Simply to provide another way that the people may elect delegates to meet in convention and deliberately frame a charter. It is an important matter in a great city like San Francisco, while a little town, perhaps, would would not require all that machinery.

He explained further that this was a copy of a provision in the recent Missouri Constitution of 1875. After Mr. Hager had concluded, Mr. Barbour proceeded to carry the fight to the opposition (1) by recommending the passage of the provision as it stood: "I do not understand," he said, "that San Francisco can proceed under a general incorporation law that may be framed by the legislature, because that general incorporation law is not broad enough to cover the interests of San Francisco." The intention of the provision was to

1. Debates and Proceedings, 1059.

authorize the people of San Francisco to frame a charter under exceptional conditions, he explained. Instead of proceeding under a general law, they were to frame a charter of their own. He pointed out the need of a new organic law in San Francisco on account of the chaotic condition of the Consolidation Act.

Mr. McCallum, speaking at this juncture,[1] asked the necessity for the general provision in the first three lines[2] (Any city having a population of 100,000 inhabitants may frame a charter for its own government, consistent with and subject to the constitution and laws of this state). "If as the gentleman says the charter must conform with general laws, why may not general law provide for submission in all cases?"

To this Mr. Barbour made a reply which stated a partial truth only, and one which applied as well to the section itself as to the question of Mr. McCallum. He said in substance that there was a question of the right of the legislature to delegate auch authority to all cities. Could not the constitution have rectified any such

1. Debates and Proceedings, 1059.
2. Ibid., 1060.

deficiency in legislative power?

Mr. Hager, however, came forward with the reason which had actually prompted these lines (1) -- they were to apply to San Francisco alone.

Section six was cited as providing in the following words, for submission to the people, which Mr. Barbour had feared the legislature would not be able to permit: "Cities and towns may be incorporated under general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith."

He seems, however, to have missed the real point at issue as did Mr. Barbour which was the framing of a charter by the people alone, independently of the legislature. The obvioud answer seems to be that what would be a delegation of power, by the legislature, and therefore not permissible, becomes a differemt question when specifically provided for in the constitution.

In answer to the question why San Francisco should have a "different rule" from the rest of the cities, he

1. Debates and Proceedings, 1060.

said , "Because she has it now. San Francisco is the only consolidated city and county in the State."

He pointed out again the need of reform in the San Francisco charter, adding that the Consolidation Act must be the foundation of any charter. For this reason he was indisposed to allow the legislature an opportunity to wreck their hopes.

Mr. Reynolds (1) brought to the notice of the convention the fact that in ordinary cases of small towns, a few leading citizens can get together, frame a charter, and have it passed by the legislature. He also added that "a few people" had gotten together in San Francisco more than once and secured Supplemental Acts amending the city charter, unknown to the body of citizens. He pointed out the impossibility of this being done (properly) in San Francisco. As an illustration of the actual situation he said that the present charter contained 319 pages, while it had originally been confined to but 31. One hundred supplemental acts, many secured at the instigation, and for the benefit , of private persons, had been added. Later re-

1. Debates and Proceedings, 1060.

marks by another speaker emphasize the clerity with which the legislature met private schemes of charter revision or amendment.

An interesting insight into the situation then obtaining in the legislative branch of the San Francisco government is given by Mr. Wellin.[1] He stated that there were 12 supervisors, any 7 of whom could pass an ordinance. If the Mayor vetoed the ordinance, only one additional vote was needed to pass it over his veto. Street assessments, under this system, had, in many cases, reached a total greater than the value of the property assessed, causing enormous losses to private citizens who were forced to see groups of capitalists bid in their property at a tax sale. He , therefore, favored the plan proposed as a means toward necessary reform.

Mr. Hale,[2] for the opposition, set up the plea that such a provision in the constitution meant a government in San Francisco independent of the legislature. He affirmed that there was no way provided for making a charter amenable to the constitution and general laws.

1. Debates and Proceedings, 1060.
2. Ibid., 1060.

"There is no power," he said, "in the legislature, no power in the judiciary, nor in any of the departments of the State, to interfere, if we establish that system. It is to be submitted to the electors alone, and if by them ratified, it becomes the organic law of the city of San Francisco."

The clause, in the provision, which enjoined judicial notice of charters adopted under it, was to him but another evidence of the intention to make San Francisco "independent." To him there seemed in addition to this no necessity for this method of securing a charter, since San Francisco would have 1/3 of the legislature. "It has and always will have a large share of the control of the state," he said. This to his mind was a sufficient check upon the power of the legislature to control the affairs of a city then over 100,000 in population.

Mr. Van Dyke,(1) in opposing the proposition of the committee, correctly diagnosed the real intention of Mr. Hager, when he pointed out that section 9 sought to make a city charter adopted in this manner, "supreme in everything except general matters." He agreed with

1. Debates and Proceedings, 1062.

the opposition that the section, as it stood, was dangerous, for local control should be always subordinate to the legislature, and this section did not make it so. He favored an amendment to read that the legislature may, by general law provide that"Any city of 100,000 inhabitants, etc."

The remarks of Mr. Howard (1) indicate the growing intensity of the debate. He stated that all the opposition to the section was coming from the advocates of centralism only. Then turning to the reason for such a section he said:

"What is the fact? It is notorious that every job is gotten up by a clique who have an axe to grind at home, and they send it to the legislature and get it adopted, and the legislature saddles it upon the people in the cities and towns. That is the history of this State. Now, sir, I speak advisedly in this matter. In the city of Los Angeles about half a dozen fellows, with an axe to grind, (the gentleman likes the expression), got up a charter and sent it up here for ratification, unbeknown to the people of the city, and they got it too. It proceeded to organize a city government under the pretence of organizing

1. Debates and Proceedings, 1062.

a Board of Public Works. And the business interests of the city would have been destroyed but for the fact that the District Court and the Supreme Court declared the act unconstitutional . . . . . And, so long as this things, is managed by the legislature, so long will these jobs and frauds prevail. . . . . And it is the proper place for this power to rest, with those who know the local interests, and who are thus able to provide for their own control."

Mr. Freeman (1) here took the opportunity to point out an obvious defect of the section which provided for amendment of a charter adopted under its terms not oftener than once in every two years "by proposals therefor submitted by the legislative authority of the city." This was changed in 1891.

Mr. Hager again came to the defence of this, his "pet" measure, (2) by pointing out that the proposed section was not an innovation even in California. The same power had often been conceded by the legislature. "Years ago, by law, the same privilege was granted to the City of San Francisco," he said.

1. Debates and Proceedings, 1082.
2. Ibid., 1082.

At this point one is met by a curious mistake, either on the part of the speaker, or the reporter. The words attributed to the speaker are these: "The section provides for the election of 15 freeholders, who may frame a charter; this, if ratified by popular vote, must be submitted to the legislature for approval."

A glance at the section as given above will show that no such provision, as that underlined, is to be found in the section. No explanation seems adequate to account for this misstatement of the provisions, except that Mr. Hager had some such amendment in mind as he was speaking and inadvertehtly expressed the idea alpud. The fact that he later introduced just such an amendment lends credence to this explanation. Later on, in the same speech, he expressed his opinion that the legislature, by general laws may limit, alter, change, annul or extend any or all the provisions of such charters framed by the people of the city, as fully as may be done in cities incorporated under general laws. "The provisions of section

6 (1) apply to all charters and to all cities generally and to none specially; there are no exceptions in favor of cities having over 100,000 inhabitants, none in favor of San Francisco." He asserted his willingness to support an amendment making the section applicable to all cities, either subject to, or not subject to, legislative control. As originally drawn it had applied to all cities. The committee was responsible for limiting it to cities of over 100,000 inhabitants. The underlined word above would lead one to suspect that Mr. Hager had either failed to fully grasp the significance of the proposal, which he had copied from the Missouri Constitution, or that, in quoting the words "limit, alter, change, annul, or extend" he was unconsciously following the phraseology of the courts, of his own and other states. These words are usually found together in any expression of the court used to indicate the complete control of the legislature over its municipal charters.

Mr. Hager continued by pointing out the subordinate position section 9 held with respect to section 6.

1. Debates and Proceedings, 1063.

"This provision, (9)," he said , "does not of itself frame a charter or create a municipal corporation. It is not intended to do so, it merely provides a mode in which cities may, consistent with and subject to, the general law, frame a charter for their government. The general law may limit their powers and restrain their action in any respect as fully as in the case of other cities, because it is declared the charters so framed must be subject to the general law."

The principle is the abolition of special law, he explained. "Our volumes of statutes are mostly filled with enactments specially applicable to the various counties and cities of the state, so that each city and county has its special and different code of laws."

One man at least saw in the proposed section what was not secured until the amendment of Article XI., section 6, in 1896, local control in purely local affairs. This man was Mr. Brown (1) who said of the section, (9), in connection with San Francisco, "That city can govern itself better than anybody else can govern it, as regards purely local

1. Debates and Proceedings, 1063.

affairs." That this interpretation was too sanguine is evidenced by the fact that it took nearly 20 years for the cities of California to secure them just that power, of local control in purely local affairs. It seems strange, too, that some one, Judge Hager, for instance, did not seize upon this expression and incorporate it in Section 6. For he must have seen that no such interpretation could be placed upon either section 9 or 6. Perhaps, it was a case of taking what he could get.

Mr. Hale now offered an amendment (1) providing the submission of a charter, so adopted, to the legislature, subject to the consent of a concurrent majority of both Houses, and the Governor. The amendment failed.

Mr. McCallum, (2) then proposed to make the section applicable to any city, striking out all after the word "city" to word "may" in lines one and two so as to read "any city may frame a charter etc." This was accepted by a vote of 48-34.

On Monday, January 20, the article of which sections 9 and 6 are a part was ordered printed and

1. Debates and Proceedings, 1063.
2. Ibid., 1064.

placed on the file.

At this point it is well to stop for a moment and summarize what has been learned.

The proponents of section 9 favored it because:

1. They wanted a greater local control in San Francisco. The gentlemen, realizing the situation in that city, were simply trying to add another safeguard against special legislation. At times one is led to feel that the crying need for change in San Francisco had blinded these men to the same conditions in the other cities of the state . Here again, perhaps, they were prompted by the knowledge that a general application of the idea would not meet the approval of the convention. "Better half a loaf than none."

2. The plan guarded against too great local power through its subordination to section 6 which provided for general laws.

3. Private interests were debarred from securing new charters or supplemental acts without the knowledge of the persons most interested -- the citizens.

4. The plan was known to have worked successfully in St. Louis.

5. It was feared that San Francisco could not proceed to frame a charter under a general incorporation act, because it would not be broad enough.

The opponents of the section were united on the following objections:

1. It is unnecessary, -- section 6 is sufficient.

2. It will make San Francisco independent of the rest of the State.

3. Local control should be always subordinate to the legislature. In this case, the legislature could not control the making of the charter.

Continuing to trace the progress of the section we find that on February 15th,[1] section 9 was temporarily passed awaiting the arrival of Judge Hager. Two days later[2] the gentleman still being absent, the section was made a special order for the following day at 2 o'clock.

At that time the section was read, and Mr. Hager promptly sent up an amendment[3]. It read :"Strike

1. Debates and Proceedings, 1381.
2. Ibid., 1386.
3. Ibid., 1406.

out in line 14 'at the end of 60 days' and insert 'be submitted to the legislature, and if approved by a majority vote of the members elected to each House it shall.' Line 29, after 'thereat' insert 'and approved by the legislature as herein provided for the approval of the charter.'"

At this point, Mr. Hager took the opportunity to speak again in favor of the section, as amended, which precipitated another debate.

He said: "The whole purpose of this article has been to take from the legislature the power of special legislation, which we all admit is necessary. It was my intention, so far as I am concerned to allow the counties to take care of their own affairs; to allow them to say whether the county should be divided or not, and thus cut off the log-rolling around the legislature by men who are scheming for the offices. One man wants to be County Judge, another Sheriff. We all know that oftimes a new judicial district has been created because some popular politician wants the position of Judge. That has been

done again and again. I know it from my own experience as a legislator. Now these are ideas which have been endorsed by all the recent conventions. When a man builds a house, if he does not adopt all the modern improvements he has an unsalable house. If we fail here to adopt the improvements which have been made in government during the last 15 years, we will be behind the age. In former times the legislative power was unrestricted. But since that it has been found necessary to place restrictions on the legislature. It is the policy now to give the people more direct control, and take away from the legislature the power to pass special laws. That is the platform on which we of San Francisco were elected. There is no provision in this article that has been criticized by the press or otherwise, but what is today in the platform which was adopted by the party, and sustained by the very papers which today are assailing this article-- not assailed because it is wrong, -- but because (of the fact) that it is the intention to take San Francisco out of the State. Now, it will not admit of any such interpretation.

"The very first part of the section says a city may frame a charter subject to the constitution and laws of this state. It (meaning the provision) may be just as stringent as the legislature shall see fit to make them. There never was any idea of secession. There never was any thought of setting up an independent government. San Francisco is subordinate to the laws of this State by the very terms of this section. As far as I am concerned in making this report, I have tried to adhere to my pledges. The convention must not lose sight of the fact that we have already taken from the legislature the power of special legislation. We are dependent upon general legislation, general laws, and we must frame our constitution with reference to it. That being so we must provide some means for the government of cities. Suppose we strike out Section 9, how is the city of San Francisco, or any other city going to have a charter? There is no way provided, except in this section. Look at the laws of this state, and you will find stacks and stacks of acts conferring additional powers upon the Boards of Supervisors."

The change put a new aspect on the discussion of the question. It had the effect of dividing the opposition; but, at the same time, it alienated a number of supporters.

Some of those who had opposed the section had done so from a fear that unless the legislature was given some sort of a check upon the freeholders' charter it would be a dangerous thing. However, it must be remembered that they were thinking of San Francisco alone when this objection was raised. Since the section had been made applicable to all cities, some were, no doubt, placated, while others saw added evils in this fact.

The most serious effect of the change lay in the fact that some of the supporters of the proposal, particularly Mr. Barbour (1) and Mr. Reynolds, (2) now opposed it, as amended. To them it seemed a surrender to the opposition.

The section (as originally proposed) stands for local self-government. Making the charter subject to the legislature you gather about it a body "to defeat

1. Debates and Proceedings, 1407.
2. Ibid., 1407.

reforms," said Mr. Barbour.

Mr. Reynolds opposed the amendment because it proceeded on the theory that "San Francisco is bent on self-destruction."

Mr. Ayers (1) opposed the section as amended because he was not disposed to place all the cities of the state wanting a new charter, at the mercy of legislative lobbies. He wanted it applied to cities of over 50,000. Why the smaller cities would be any freer from lobbies without the provision, as amended, than with it, it is difficult to determine, because the evidence adduced on this point by several members of the convention, pointed to this as a great evil under the old method of charter-making.

Mr. Stedman (2) offered an amendment to the amendment to read as follows: Insert after the word "legislature" where it first occurs in the amendment the words "for the approval or rejection as a whole; without power of alteration or amendment." This was adopted.

The amendment, as amended, was then accepted by a vote of 63-57. A change of 4 votes would have set

1. Debates and Proceedings, 1407.
2. Ibid., 1408.

back municipal development indefinitely, perhaps. The whole article having been disposed of, it was ordered engrossed and read aloud a second time.

The struggle, for such it had in reality been, was not yet over. The final vote took place some time later.[1] The section was now section 8 and began, as amended in the Committee of the Whole, "Any city may frame a charter, etc." Again the objection was raised that the legislature had been given too large a control. An amendment by Mr. Wilson,[2] of San Francisco, providing for special charters for cities over 100,000 was rejected.

An amendment by Mr. Moreland,[3] who seems to have become either converted or reconciled, read thus: Insert after "city" and before "may" in the first line, the following, "containing a population of more than 100,000 inhabitants." It was adopted.

Section 6 which had been amended and passed over, during Mr. Hager's absence, by the convention, meeting as a Committee of the Whole, was again changed to read as originally reported.

1. Debates and Proceedings, 1483.
2. Ibid., 1483.
3. Ibid., 1483.

Roll was called and the Article, number XI., was adopted by a vote of 89-28 as a part of the constitution, subject to ratification on the part of th e people. It was then referred to the Committee on Revision and Adjustment.(1)

C. ATTEMPTS TO SECURE A FREEHOLDERS' CHARTER IN SAN FRANCISCO.

Bancroft points out that no election was held in 1879 for freeholders to frame a charter in San Francisco to supersede the Consolidation Act. It was feared, therefore, by some of the leading lawyers of the city, that San Francisco would be deprived of her special legislative charter, on July 4, 1880.(2) When the legislature convened in January 1880, it was met by a request, from the Board of Supervisors of San Francisco, for some legislative provision to govern the city until a freeholders' election could be held and a permanent charter adopted. The result was what is known as the McClure charter which provided for the organization, incorporation and government of merged and consolidated cities and counties of more than 100,000 popu-

1. Reports and Proceedings, 1483.
2. San Francisco Chronicle, Nov. 16, 1866, cited in Bancroft, Pacific States, XVIII., 412.

lation, pursuant to the provisions of Section 7, Article XI., of the constitution of the state.[1] Immediately, the constitutionality of this act was called into question, and the court construed it as special legislation, which the constitution expressly forbade.[2]

Meanwhile, a special election was held for the election of freeholders. The board sat from April 12 to June 28, 1880. The charter framed by them was submitted to the people and, though a good one, was defeated.[3] Bancroft assigns two main reasons for this defeat,[4] so strange in light of the fact that section 8, Article XI,, had been inserted in the Constitution primarily to meet the needs of San Francisco.

First, he says, party selfishness cooperated against the charter. The new instrument greatly lessened the opportunity for jobbery and corruption. The second reason was the opposition of the Catholic clergy, due to an article in the charter prohibiting cemetaries within the city limits. "The issuance of a pastoral letter against the so-called sacrilege determined the vote of the Catholic

1. California Statutes, (1880) 137-229.
2. Bancroft, Pacific States, XVIII., 412.
3. Oberholtzer, Home Rule for our American Cities in Annals of American Academy of Political and Social Sciences .(Special Election - Sept. 8, 1880- Against- 19, 143 ; For - 4, 144). 68-95, (1893)
4. Bancroft, Pacific States, XVIII., 412.

voters " which was against the charter."[1] Fully half of the voters neglected to vote.

In 1882 another election of freeholders took place and another charter was framed, similar in many ways to the Consolidation Act,[2] which, it will be remembered, Judge Hager, in debate on Section 8, had considered the necessary foundation of any new charter to be framed for San Francisco.[3] At an election held March 3, 1883 it was rejected[4] by 32 votes.

Four years intervened before the next attempt to secure a new charter. Freeholders were chosen at a general election, Nov. 15, 1886. The charter was completed in March 1887. At the charter election, April 12, this charter, also was defeated, because the voters failed to take sufficient interest.[5]

Finally, in 1898, San Francisco secured a freeholders' charter which was ratified by the legislature during the session of 1899.[6] It went into effect in 1900.[7]

A considerable number of other California cities have been more fortunate, however, in securing charters at

1. Bancroft, Pacific States, XVIII., 412.
2. Ibid., XVIII., 412.
3. Debates and Proceedings, 1060.
4. Bancroft, Pacific States, XVIII., 412; Oberholtzer, Home Rule in Annals of American Academy, 68-95 (1893)
5. Ibid., XVIII., 413; Ibid., 68-95(1893).
6. California Statutes, (1899), 241.
7. Amendments were ratified 1903, 1907, 1911 and 1913.

once. The legislature has never failed to ratify a charter. Following the amendment, adopted in 1887, extending the provisions of section 8 to cities over 10,000 (and less than 100,000 inhabitants); four cities, Los Angeles, Oakland, Stockton and San Diego, adopted freeholders' charters, which were ratified by the legislature of 1889.[1] San Jose adopted a new charter May 17, 1892 which was subsequently ratified by the legislature.[2] A subsequent amendment, adopted Nov. 4, 1890, permitted cities of over 3,500 inhabitants to frame their own charters. Fourteen new cities had come in, under this amendment, up to 1893.[3] Sacramento secured a charter that year.

In all 31 cities have availed themselves of the opportunity of making their own form of government.

Freeholders' charters have been ratified by the legislature as follows: 1889 -- Los Angeles, Oakland, Stockton, San Diego; 1893 - Grass Valley Valley, Napa, Sacramento; 1895 -- Berkeley, Eureka; 1897 -- San Jose; 1899-- San Francisco, Santa Barbara, Vallejo; 1901 -- Fresno, Pasadena; 1903 -- Salinas, Santa Rosa, Watsonville; 1905-- San Bernardino, Santa Rosa; 1907 -- Alameda, Long Beach,

1. Oberholtzer, Home Rule in Annals of American Academy, 68-95, (1893).
2. Ibid., 68-95, (1893).
3. Ibid.,68-95, (1893).

Riverside, Santa Cruz, Santa Monica; 1909 -- Berkeley, Palo Alto, Richmond; 1911 -- Vallejo, Santa Cruz, San Luis Obispo, Pomona, Petaluma, Oakland, Monterey, Modesto, Stockton and Sacramento.

Among the other cities which have for 10 years or more possessed the requisite number of inhabitants only Bakersfield, Santa Ana, Redlands, and Santa Clara have not now freeholders' charters.(1)

1. Reed, Municipal Home Rule in California in National Municipal Review, I., 571, (1912).

II. The Present Status of Section 8.

A SUMMARY OF PROVISIONS OF ARTICLE XI.

The broad, outstanding features of the new constitution as a whole may be summarized thus:

1. Special legislation was forbidden in a large number of cases.
2. The legislature could not authorize state or political subdivisions to subscribe to corporate stock; or, lend or authorize aid of state credit.
3. No appropriations by any governmental agency for the aid of religious activity.

This summary is based on three of the most outstanding abuses to which the legislature had succumbed under the old constitution.(1)

For our purposes, a paraphrase of Article XI., relating to counties, cities and towns, is desirable. No county could be established with less than 5,000 inhabitants, or divided when the population was less than 8,000; nor should the dividing line pass within 5 miles of the county seat.

I. Bancroft, Pacific States, XVIII, 377.

Counties were to be classified according to population, and the legislature should provide a uniform system of county governments under general laws regulating the compensation of county and municipal officers, who were to be held to a strict accountability.

Corporations for municipal purposes should not be created under special laws, but should be organized under general laws which should provide for their organization and classification; and cities and towns heretofore and hereafter organized shomld be incorporated under these laws whenever a majority of the voters voting at a general election should so determine. (Section 6).

City and county governments might be consolidated, as in the case of San Francisco -- into one government. In consolidated city and county governments of more than 100,000 population there should be two boards of supervisors, or houses of legislation, one of which to consist of twelve persons, should be elected from the city and county at large for a term of 4 years, so classified that six should be elected every 2 years for the 2 year term, vacancies occuring to be filled by the mayor or other chief

executive officer.

Any city of more than 100,000 population might frame a charter for its own government by choosing fifteen freeholders at any general election to prepare a charter, said freeholders to have been qualified voters for 5 years. The qualified electors should receive 30 days notice of the submission of the charter for approval, when, if approved, it should be submitted to the legislature for rejection or approval as a whole, without power of alteration. Amendments to a charter should not be made oftener than once in 2 years. (Section 8).

Counties, cities, and towns should pay proportional taxes to the state; but, the legislature should not have power to impose taxes for municipal purposes; yet it might vest the power in corporate authorities to assess and collect taxes for municipal purposes. The legislature should not delegate to any special commission, private corporation, or individual, any power to control, appropriate, supervise, or in any way interfere with any county, city, town, municipal improvement, money, property or effects, whether held in trust or otherwise.

No state office should be continued or created in any municipality for the inspection, measurement or gradation of any merchandise, manufacture, or commodity; but the city should be authorized by general law to appoint such officers.

Private property should not be taken or sold for the payment of the corporate debt of any political or municipal corporation.

All moneys collected for the use of any such corporation should be immediately deposited with the treasurer or other legal depository.(1)

The making of profit out of public money or using it for any purpose not authorized by law by any officer having possession or control of it, should be prosecuted and punished as a felony.

No city, county, township, board of education, or school district should incur any liability exceeding the income provided for each year, without the assent of 2/3 of the qualified electors voting at a general election, or without providing for the interest and sinking fund to extinguish such indebtedness within a limited time.

1. Bancroft, Pacific States, XVIII., 377.

No public work or improvement of any description should be made in any city, the cost of which should be made chargeable upon the private property by special assessment, unless after an estimate of such expense had been made, and an assessment levied in proportion to the benefits to be effected on the property had been levied, collected and paid into the city treasury.

Thus, in substance, the provisions of Article XI, read upon their adoption in 1879. All of them have an interest for the student of home rule in California, while two, section 6 and 8, have a peculiar, and deeper interest than the rest.

Perhaps, it would not be amiss to trace the weaknesses (for there were many) and omissions of section 8, as they are shown by the changes which have taken place since 1879.

B. Changes in Section Eight.

Not long after the adoption of the new constitution, the smaller cities of California began to feel that they too had interests which were peculiar to themselves -- sui generis. The result was an amendment to Section 8 in

1887,[1] which permitted "any city containing a population of more than 10,000 and not more than 100,000 inhabitants" to choose a board of freeholders for the purpose of framing a charter."

Another change in the same year referred to the publication of the charter. It was brought about by adding this clause: " and the first publication shall be made within 20 days after the completion of the charter."[2]

But, two years later occured changes which were greater in importance than any yet made. The provision was made applicable to cities "containing a population of more than 3,500 and not more than 10,000 inhabitants."[3] This extended the privilege of home rule to a considerable extent.

The greatest change came in the provisions relating to the ratification or rejection of a charter by the legislature after its acceptance by the people of a city. This part of section 8 it will be remembered, read: "and if approved by a majority vote of the members elected to each House, (such approval may be made by concurrent resolution) it shall become the charter of such

1. California Statutes, (1887), 89.
2. Ibid., (1887), 89.
3. Ibid., (1889), 340-343.

city, or, if such city be consolidated with a county, then of such city and county, and shall become the organic law thereof; and supersede any existing charter, and all amendments thereof, and all (special) laws inconsistent with such charter."(1)

The words in the first parenthesis were added, thereby facilitating the acceptance or rejection of the charter by the legislature. The word in the second parenthesis was dropped, thereby making the charter in reality a "law unto itself" at the time of its framing and acceptance. It would, of course, be subject to all general laws passed after it had gone into operation. The one thing now most desirable was the freedom of the charter from change through general laws in certain matters. How this was partially brought about will be seen in a consideration of the judicial decisions bearing on section 6, Article XI.

The first line of the provision was again changed in 1891 to read: "Any city containing a population of more than 3,500 inhabitants."(2) This was merely a simplification of the language of the section. Regarding

1. California Statutes, (1889), 340-343.
2. Ibid., (1891), 533.

the publication of the charter proposed by the board of freeholders, another change was made.[1] These words were added: "provided, that in cities containing a population of not more than 10,000 inhabitants such proposed charter shall be published in one such daily newspaper."

One thing which had been objected to in the convention, but which for some reason had been left unchanged was the method of amending such charters. A consultation of the provisions reveals the fact that the legislative body alone had the power of deciding what to submit, and when, subject to the restriction that no change should be made oftener than once in 2 years.

By 1901, the ineffectiveness of this method had become only too apparent. No doubt, the people could, through the newspapers, or their representatives in the city legislature, or by individual or collective petitions, make known their wants concerning desirable changes in the charter. But, there was no way of compelling action. As a result, therefore, it became necessary to amend the constitution. The legislature of 1901 submitted the following amendment to section 8, which was adopted.[2]

1. California Statutes, (1891), 533.
2. Ibid., (1901), 951.

"Whenever 15% of the qualified voters of the city shall petition the legislative authority thereof to submit any proposed amendment or amendments to the qualified voters thereof for approval, the legislative authority thereof must submit the same."

The year 1905 saw another step taken along the ever-broadening road to home rule. It came through an amendment which read thus: "Any city having a population of more than 3,500 inhabitants, may frame a charter for its own government, consistent with and subject to the constitution, [and laws] (or, having framed such a charter, may frame a new one)." (1)

The significant thing about this change is the dropping of the words in the bracket [ ]. Charters from now on, are to be consistent only with the constitution, when adopted. Of course, general laws passed later apply where not inconsistent with the charter.

The charter so adopted was to "supersede any existing charter, (whether framed under the provisions of this section of the constitution or not)." The next amendment to section 8 came in 1911. (2) Careful provision

1. California Statutes, (1905), 1064.
2. Ibid., (1911), 2175-2179.

was made regarding the ascertainment of the population necessary for the adoption of a freeholders' charter. The board of freeholders can now be elected at the instance of the legislative authority by a 2/3 vote, or, upon the presentation of a petition praying for such election signed by 15% of the qualified electors, the legislative authority of the city must call such election, within not less than — days after adoption of the ordinance, or presentation of the petitions.

Candidates for the board of freeholders are to be nominated by petition.

The board shall prepare a charter within 120 days, instead of within 90 days as provided in the former provisions.

The charter, so prepared, is filed with the city clerk, not the mayor as formerly.

The provisions regarding publication are greatly changed.

Prior to 1911, they read: "Such proposed charter shall then be published in 2 daily papers of general circulation in such city for at least 20 days."

The new provisions, made necessary, no doubt, by the application of the section to much smaller cities than those originally contemplated, read: "Said council, or other legislative body, shall, thereupon, cause said proposed charter to be published for at least 10 times in a daily newspaper of general circulation, printed, published, and circulated in said city: provided that in any city when no such daily newspaper is printed, published, and circulated, such proposed charter shall be published for at least 3 times, in at least one weekly newspaper of general circulation, printed, published, and circulated in said city; (and in any event, the first publication shall be made within 15 days after the filing of a copy thereof, as aforesaid, in the office of the city clerk).

The provisions appearing prior to this in regard to first publication were: "and the first publication shall be made within 20 days after the completion of the charter; provided, that in any city containing a population of not more than 10,000 inhabitants, such proposed charter shall be published in one such daily paper." The last provision was entirely dropped in the amendment of 1911 and replaced

as indicated above.

Regarding the submission of the charter so proposed and published the old provisions merely said: "and within not less than thirty days after such publication it shall be submitted to the qualified electors, of such city, at a general or special election.

The amendment of 1911, is far more explicit and far-reaching. It provides: "Such proposed charter shall be submitted by said council, or other legislative body, to the qualified electors of said city at a special election held not less than 20 days nor more than 40 days, after the completion of such publication; provided, that if a general municipal election shall occur in said city not less than 20 days, nor more than 40 days, after the completion of such publication, then such proposed charter may be so submitted at such general election."

The next clause of the former provision said: "and if a majority of such qualified electors voting thereat shall ratify the same, it shall be submitted to the legislature, such approval may be made by concurrent resolutions, and if approved by a majority vote of the

members elected to each house, it shall become the charter of such city, or, if such city be consolidated with a county, then of such city and county."

The new provision reads thus: "If a majority of such qualified electors voting thereon at such general or special election shall vote in favor of such proposed charter, it shall be deemed to be ratified, and shall be submitted to the legislature, if it be in regular session, otherwise at its next regular session, or it may be submitted to the legislature in extraordinary session, for its approval or rejection as a whole, without power of alteration or amendment.

"Such approval may be made by concurrent resolution, and if approved by a majority vote of the members elected to each house, such charter shall become the charter of such city, or if such city be consolidated with a county, then of such city and county."

Following the provision for the approval of the legislature, we find in the old section the following: "and shall become the organic law thereof, and, supersede any existing charter, (whether framed under the provisions

of this section of the constitution, or not), and all amendments thereof, and all laws inconsistent with such charter."

The new provisions are exactly the same.

More explicit directions as to the filing of the charter, after approval by the legislature, appear in the amendment of 1911.

Amendments may be submitted and approved in the same way as provided for the submission and approval of the original charter, in the new provisions.

The following finds no counterpart in the old provisions:

"Every special election held in any city under the provision of this section for the election of a board of freeholders, or for the submission of any proposed charter or any amendment or amendments thereto, shall be called by the council or other legislative body thereof, by ordinance which shall specify the purpose and time of such election, and shall establish the election precincts and designate the polling places therein and the names of the election officers for each such precinct. Such ordinance

shall prior to such election, be published 5 times in a daily newspaper, or twice in a weekly newspaper printed, published and circulated in said city. Such election shall be held and conducted, the returns thereof canvassed, and the result thereof declared by the council, or other legislative body of such city, in the manner that is now or may hereafter be provided by general law for such elections in the particulars wherein such provision is now and may hereafter be made therefor, and in all other respects in the manner provided by law for general municipal elections, in so far as the same may be applicable thereto.

"Whenever any board of freeholders shall be elected, or any such proposed charter or amendment or amendments thereto shall be submitted at a general municipal election, the laws governing the election of city officers, or the submission of propositions to the electors, shall be followed in so far as the same may be applicable thereto and not inconsistent herewith.

"It shall be competent in any charter framed by any city under the authority given in this section or by amendment to such charter, to provide in addition to those

provisions allowed by this constitution and by the laws of the state, for the establishment of a borough system of government for the whole or any part of such city, by which one or more districts may be created therein, which districts shall be known as boroughs, and which shall exercise such special municipal powers as may be granted by such charter, and for the organization, regulation, government and jurisdiction of such boroughs.

"All provisions of this section relating to the city clerk shall, in any city and county, be deemed to relate to the clerk of the legislative body thereof. (Amendment adopted Oct. 10, 1911)."

III. Section Six, the Bulwark Against the Legislature.

A. Constitutional Changes and Judicial Interpretations.

I. Decisions Prior to Amendment of 1896.

Standing forth in bold relief against the background of Article XI., as a whole, in the Constitution of 1879, are two sections 8 and 6. The one represents the method by which certain cities may adopt an "organic law" for their own government. The other is the supposed bulwark of the "organic law", so adopted, against the legislature. Or, to use the language of the court on this point, (1) "It is manifestly the intention of the constitution to emancipate municipal governments from the authority and control formerly exercised over them by the legislature." This is undoubtedly true. Yet, in view of the wide divergence of opinion in the Convention on Section 8, and the long drawn out discussion on it, we are inclined to the belief that it, and not section 6, was considered the most vital, and that the full import of section 6 was never, until recently, realized.

Section 8 has needed no such interpretation, as far as amount goes, as section 6 has. And, it stands to-day

1. People vs. Hoge, 55 Cal. 612, (1880)

substantially as it did in 1879, a mode of procedure. On the contrary, Section 6 has been, since 1880, the "thorn in the flesh" of California municipalities in their struggle for a full and adequate measure of home rule. As found in the final draft of the constitutional convention of 1878-79, the concluding sentence of Section 6, Article XI., read as follows: "Cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws."

The large number of decisions rendered upon Section 6, both before and after the amendment of 1896, together with their far reaching effect, makes its consideration one of paramount importance. The men who had framed the constitutional provision in regard to City, County, and Township Organization were soon to learn what a court can do in the way of rendering constitutional provisions unrecognizable even to their framers. People vs. Hoge, already cited, stated correctly, no doubt, the intention of Section 6, "The emancipation of municipal governments", but the courts soon began grinding out a remarkable grist

of interpretations. The legislature had passed an act amending section 4109 of the Political Code, which provided for the election of county, city, and township officers. The court, in 1882,[1] decided that this was a general law under section 6, Article XI., and paramount to the provisions of the charter of San Francisco, the Consolidation Act of 1856. It went on to say, "The constitution has provided, in effect, that the city and county of San Francisco shall not be compelled to surrender its present charter for one it does not want; and further, that its charter shall not be changed by special legislation, directly or indirectly . . . . . At the same time, recognizing the fact that the city and county of San Francisco remains a subdivision of the State, the Constitution has said, in effect, that it, as well as other cities and towns heretofore or hereafter organized shall be subject to and controlled by such general laws as the legislature shall enact, other than those for the incorporation, organization, and classification according to population."

In this case a dissenting opinion rendered by

1. Stoude vs. Election Commissioners, 61 Cal. 313,(1882).

Justice Sharpenstein, and concurred in by Justice McKinstry, objected that (1) the amendment to section 4109 of the Political Code was not a general law under section 6, and (2) that general laws under the constitution did not apply to cities organized before the adoption of the constitution.

This narrow view must have come as a distinct shock to those who had foreseen a period of municipal freedom from legislative dominance. But the shock was soon to be repeated when, in 1887,[1] the Vrooman Act was held a general law, and a virtual repeal of the provisions of the San Francisco charter relating to street work, passed April 1, 1872. The court, in commenting on the restrictions on the legislature in the constitution, Article XI., section 6, said: "3.A charter cannot be amended by a special law. But while these restrictions exist, the legislature has the power to control the charters of all corporations by general laws. The restrictions above pointed out do not at all affect the power to control or regulate the charters of all municipal corporations by laws general in their character."

1. Thomason vs. Ashworth, 73 Cal. 73, (1887). Justice McKinstry, Sharpenstein concurring, held that the Vrooman act did not apply to San Francisco.

"On reading the constitution it will be observed that its framers were particularly careful to restrict the legislature from passing local or special laws. See Article IV, section 25, Article XI, sections 4,5,11,12,14, where legislative powers are conferred on counties, cities, and towns or townships by the constitution,-such powers are still made subject to and liable to be controlled by general laws."

A law of 1885, known as the Whitney Bill, providing for police courts in cities of a specified population, was the subject of two important decisions. In 1888, this act was held to be a general law,(1) repealing the provisions of the charter of Oakland on the same subject, dating from 1866. The plaintiff, seizing upon the dissent of the two justices in the Staude Case that general laws under the constitution did not apply to cities organized before the adoption of the constitution, was met by the following statement: "The legislature has power to pass general laws affecting municipal corporations, without reference to whether such corporations were formed before or after the Constitution of 1879." A dissent was again

1. People vs. Henshaw, 76 Cal. 436, (1888).

registered by Justice McKinstry.

The second decision on the Whitney Bill,[1] in 1890, declared the invalidity of the provision of the Los Angeles charter of February 14, 1889, relating to police courts. This charter, it will be noticed, was adopted after the adoption of the constitution, and by the people of Los Angeles, under Section 8 of Article XI. --- a freeholders' charter.

In the case of Ah You, and in that of Davies vs. Los Angeles, Justice Fox wrote dissenting opinions. Chief Justice Beatty wrote a brief opinion in the latter case, concurring in the dissent of Justice Fox, and declaring that he considered the cases of Thomason vs. Ashworth, People vs. Henshaw, and Ex parte Ah You to have been "erroneously decided."

In Ex parte Keeney,[2] also decided in 1890, section 11, Article XI. (which was applicable to consolidated cities and counties by section 7 of the same article,) was interpreted as giving to the city and county of San Francisco the power to make only such sanitary regulations as were not in conflict with general laws.

1. Ex parte Ah You, 82 Cal. 339, (1890).
2. Ex parte Keeney, 84 Cal. 304, (1890).

Later in the same year,[1] another provision in the Los Angeles freeholders' charter of 1889, relating to the opening and widening of streets, was declared invalidated by an act of the legislature, (1889), on the same subject. The court said: "Under section 6, Article XI., all charters framed and adopted under the constitution are subject to and controlled by general laws, and a special charter adopted by a city under section 8, Article XI., is no exception to this rule, any special provisions of such charter in conflict with general laws passed after its adoption being superseded by such general laws." The following quotations from the same case may throw some light on the general attitude of the court on general and special laws:

"In construing an act of the legislature to determine whether it is a general or special law, the Supreme Court is governed by the language of the act, and not by any outside showing as to the intent and object of its passage; and a law general in its terms, and which may be applied to all cities, cannot be assailed on the ground that it was in fact passed to affect an improvement in one

1. Davies vs. City of Los Angeles, 86 Cal. 37, (1890).

city only."

This, together with the holding of the court, in another case,[1] that classification could be made to suit the necessities of the case, and need not follow that in the act of 1883 providing for the six classes of cities, shows the direction in which the courts were headed. It can hardly be doubted that a few years later would have seen in California just such a situation as that in Ohio, following the prohibition of special legislation in the Constitution of 1851, despite sections 6 and 8 of Article XI., Constitution of California.

A provision of the Los Angeles charter was, in 1891,[2] declared void because it provided for the deposit of public money of the city in banks, which was inconsistent with the provisions of "sections 424 and 426 of the Penal Code, establishing penalties for certain acts committed by any person charged with the receipt, safe-keeping, transfer, or disbursement of public moneys, belonging to a city, which penalties could not be visited upon a private corporation, in whose possession and control the moneys of the city are placed."

1. Daniels vs. Henshaw, 76 Cal. 436, (1888).
2. Yarnell vs. Los Angeles, 87 Cal. 603,610, (1891).

Two years later a decision was rendered turning on nearly the same point,[1] The "provisions of the San Diego charter that all moneys belonging to the school fund of the city shall be deposited with the city treasurer cannot, as we have seen, supersede the requirements of the Political Code that all money pertaining to the public school system shall be paid into the county treasury." The court adds: "All city charters are limited by the operation of general laws."

"Education and the management and control of the public school system is a matter of state supervision," we are told. Conlin vs. Board of Supervisors,[2] decided prior to the adoption of the amendment to section 6, Article XI., held that "the legislature has no power to control municipal funds for any other than municipal purposes . . . . "

This looks like a direct slap at the proposed amendment soon to go before the people for consideration, even though it was, in reality, a repudiation of an act of the legislature aimed at the city of San Francisco.

The result, then, by 1896, or even earlier, was

1. Kennedy vs. Miller, 97 Cal. 429, (1893).
2. Conlin vs. Board of Supervisors,114 Cal. 404, (1896).

the settled doctrine that, under the original provisions of section 6, Article XI., the legislature possessed the power, by means of general law, to supersede, without the consent of the municipality, the powers conferred upon it, either by a special legislative charter or by a freeholders' charter under constitutional provisions, and to prevent, by anticipation, the regulation by freeholders' charters of matters already covered by general laws. All this, in spite of the provisions of section 8, Article XI., which announced that a freeholders' charter "shall become the organic law of the city, and supersede any existing charter, and all amendments thereof, and all laws inconsistent therewith."(1)

2. Decisions since Amendment.

Realizing that their plain desires had been reasoned away by the court, the advocates of <u>real</u> municipal home rule secured the passage by the legislature, and the adoption by the people, of the amendment of 1896, known as the "Municipal Affairs" amendment to section 6, Article XI. The last clause of this section was changed to read: "and cities and towns heretofore and hereafter organized

1. The original section had the word "special" before "laws". This reading was continued in the amendment of 1887, but omitted in those of 1892, 1902, 1906,1911.

and all charters thereof framed and adopted by authority of this constitution, except in municipal affairs, shall be subject to and controlled by general laws."(1)

By the addition of the phrase "except in municipal affairs" the attempt had been made to remedy the patent defect of the section as originally framed and adopted. The phrase was so ambiguous, however, that in every case where a city attempted to use a power which was thought to be comprehended within the meaning of the words, recourse to the courts was necessary to establish the fact.(2)

a. Definition of Municipal Affairs.

The first serious attempt to go into the real significance of the expression "except in municipal affairs" took place in 1899 in the case of Fragley vs. Phelan,(3) So important is the bearing of this case on the status of home rule in California that a detailed study will be made of it.

This was an action to test the validity of the new charter to take effect on January 1, 1900. The act of 1897, called the "charter election act", was widely divergent from the general laws of election for San Francisco. For

1. Justice Angellotti, in Ex parte Braun, 141 Cal. 204,(1903).
2. Morton vs. Broderick, 118 Cal. 474, (1897).
   Popper vs. Broderick, 123 Cal. 456, (1899).
   People vs. Oakland, 123 Cal. 598, (1899).
3. Fragley vs. Phelan, 126 Cal. 383, (1899).

this reason the validity of the charter was disputed in an injunction sought against the board of supervisors by a tax-payer, to restrain them from expending public money in an election to be held in pursuance of the charter. The court said:

"The act of 1897, called the "charter election act," in relation to elections held under section 8, Article XI., to elect boards of freeholders, or to vote upon proposed charters, etc., does not violate section 6, Article XI., but is constitutional and valid." (1)

"The election of a board of freeholders to frame a charter, and the election at which a vote is had to confirm the charter, are not "municipal affairs" within the meaning of the exception to section 6, Article XI., and such elections may be subject to and controlled by general laws." (2)

"'Municipal affairs' as those words are used in the organic law, refer to the internal business affairs of a municipality, and the constitution indicates that there is a large amount of legislation pertaining to cities and towns which does not come under the classification of

1. Justices Garoutte, VanDyke and McFarland.
2. Justices Garoutte, VanDyke and McFarland; Temple dissenting.

municipal affairs." (1)

"Section 6, Article XI., is to be construed distributively, as applying to any 'city and town, etc., except in municipal affairs', and as allowing the municipality to be controlled by general law upon all matters in respect to which the charter is silent." (2)

It will be seen that there were three different opinions, and a closer examination of the reasoning of the decision will disclose the fact that they all differed over two points of construction: (a) the test by which an "affair" is determined to be a "state" or "municipal" affair; and (b) whether the words "except in municipal affairs" implies a general grant to all freeholders' charter cities, and all special legislative charters framed prior to the adoption of the new constitution, or whether these matters must be explicitly provided in their charters.

Justice Harrison's opinion, concurred in by Chief Justice Beatty and Justice Henshaw, and dissented from by Justice Temple, is given above, and has come to be the guiding rule of the court.

Justice Temple, in his dissent, used the following

1. Justices Garoutte, Van Dyke and McFarland; Temple dissenting.
2. Justices Harrison, Beatty and Henshaw; Temple dissenting.

words: "If such power is not found in the charter, it is my opinion, no general law can add that provision to the charter. I cannot comprehend how it can be said that a statute which confers upon a city council additional powers over affairs of the city---powers which have always been deemed municipal and only concern the city as such --- . . . . . is not a municipal affair. If a general law, having such effect, is not prohibited by section 6, Article XI. of our constitution, then the language has lost its force, and nothing has been acomplished by this long struggle and many amendments to the constitution for the purpose of preventing interference with "municipal affairs."

In another place he says: "To hold that these charters are to be practically amended in some respects, or by some general laws, in regard to municipal affairs, is to disregard the words of the amendment, and not to construe them."

Justice Harrison's opinion has since been followed in a number of cases. Among them are Ex parte Braun, In re Pfahler, Rothschild vs. Bantel, Sunset Co.

vs. Pasadena, and Clause vs. San Diego.[1] The first four hold that explicit reference to a "municipal affair", in the charter of a city, is paramount to the general law. Clause vs. San Diego, citing Fragley vs. Phelan, says: "A city cannot claim to be exempt from gemeral laws relating to "municipal affairs" if there is no provision relating to such affairs in the charter under which it is acting, whether such charter is one framed by itself, or given to it be the legislature."

b. What Affairs are Municipal Affairs.

As regards the determination whether or not a certain matter is a municipal affair, three different views have been advanced: In Fragley vs. Phelan,[2] the following definitions of a "municipal affair" were given:

(a) "the internal business affairs of a municipality";

(b) "such affairs only as that municipality has the power to engage in or perform, as set forth under its powers found in its charter; and

(c) "any purpose for which cities and towns are organized." The courts have applied one or another of these tests in a large number of cases, but the second one which

1. Ex parte Braun, 141 Cal. 204.
   In re Pfahler, 150 Cal. 71.
   Rothschild vs. Bantel, 152 Cal. 5.
   Clause vs. San Diego, 159 Cal. 434.
   Sunset Co. vs. Pasadena, 161 Cal. 265.
2. Fragley vs. Phelan, 126 Cal. 383, (1899).

limits the freedom from general laws of chartered cities in regard to "affairs" exercised by them to matters in which they are, by the express terms of their charters, permitted to engage, is the favorite one.

Cases of this nature are of two kinds:

(1) Those holding certain affairs to be municipal;

(2) Those holding certain affairs not to be municipal

In dealing with the cases bearing on the question of what are, or are not, "municipal affairs", it is unnecessary to follow the chronological order, but, in order to preserve the continuity of progress, that plan will be followed. In each case the words of the court will be used as nearly as practicable.

The first case construing the test as to whether or not a particular "affair" was "municipal" was decided in 1897.[1] The court said: "The act of 1897 requiring the signature of the mayor to a tax levy does not apply to the city and county of San Francisco, as it deals with municipal affairs which, by the constitutional amendment of 1895 (1896), are exempted from the control of general laws in cities and towns not organized under the general

1. Morton vs. Broderick, 118 Cal. 474, (1897).

scheme embraced in the municipal incorporation act, but which are organized under special charters; and the signature of the mayor of San Francisco is not required ------ "

Popper vs. Broderick,(1) followed in 1899. The decision stated: "The people, in adopting the constitutional amendment of 1896 to section 6, Article XI., so as to exempt 'municipal affairs' from being subject to and controlled by the operation of general laws, are deemed to have done so in view of the decision of the court, distinguishing and classifying the municipal officers of San Francisco, including the officers of the police and fire departments. The pay of those officers clearly falls within the term 'municipal affairs'; and the act of the legislature of 1897,(2) increasing the pay of officers of each of these departments in municipalities of the first class, is unconstitutional and void."

The following year the opening, widening, and vacating of streets of a municipality was held to be a "municipal affair."(3)

The issuing of bonds for the acquisition and

1. Popper vs. Broderick, 123 Cal. 456, (1899).
2. California Statutes, (1897), 54-72.
3. Byrne vs. Drain, 127 Cal. 663, (1900).

improvement of boulevards[1] is a "municipal affair". The court said: "The respective schemes of the charter and the Park and Boulevard Act[2] for the creation of bonded indebtedness to acquire improvements are different in many respects, and therefore the Park and Boulevard Act is inconsistent with the charter. That act being superseded by the charter, it is gone from the case. It went instanter the moment the charter took effect."

McHugh vs. San Francisco, decided the same year, says:[3] "The Public Improvement Act, providing for elections authorizing bonded indebtedness for the construction of school-houses, sewers, etc., was superseded, as to San Francisco, by the newer charter, providing for 'permament municipal buildings and improvements', and stands to the municipality as if it had been repealed." Permanent municipal improvements and buildings are, then, "municipal affairs". The year 1902 sees two more "municipal affairs" added to the rapidly growing list. One case[4] held that a charter board of health superseded a board of health under the Political Code. In the words of the court: "Municipal powers are conferred upon and

1. Fritz vs. San Francisco, 132 Cal. 373, (1901).
2. California Statutes, (1889), 361.
3. McHugh vs. San Francisco, 132 Cal. 381, (1901).
4. People vs. Williamson, 135 Cal. 415, (1902).

municipal duties are imposed upon the municipal board by its charter, and that board, as to its municipal functions, is a 'municipal function' which the city may lawfully maintain." The other case (1) decided that: "The control of the almshouse of San Francisco by the board of health established under the new charter is a municipal matter of which that board has exclusive jurisdiction, and the city charter has operated to divest the authority of the state board of health over the almshouse."

In 1904 we find the court in People vs. Worswick (2) deciding that a city has the right to provide in its charter exclusive provisions for municipal elections. This is clearly indicated by the following words: "Indeed, the general laws of the state touching the registration of voters prior to state and county elections have no bearing on an election of city officers in a municipality governed by a freeholders' charter, except so far as they are adopted by the city itself. It is conceded that the election here in question is a 'municipal affair', and, of course, the city could have adopted any system of registry, or could have declined to have any at all."

1. Weaver vs. Reddy, 135 Cal. 430, (1902).
2. People vs. Worswick, 142 Cal. 71, (1904).

In Law vs. San Francisco (1) it was decided, in the same year, that issuing of bonds, for the repair of existing school-houses, and the building of new ones, was a "municipal affair." Three other cases decided in 1904 held that a licensed tax for revenue provided for in a special legislative charter antedating the constitution of 1879, is a "municipal affair". (2) The last case says:"A provision in a charter authorizing a municipality to impose a license tax for purposes of municipal revenue is a 'municipal affair,' and within the proper scope of a municipal charter."

Ex parte Braun, (3) decided in 1903, arose out of a habeas corpus proceeding to test the validity of an ordinance of Los Angeles forbidding the sale of liquor without a license. The court held: "A municipal charter framed under section 8, Article XI., conferring upon it the power of taxation for purposes of revenue, makes such a power a 'municipal affair' within the meaning of section 6 of that article . . . . . and such powers cannot be withdrawn or abrogated by the legislature."

"Section 3366 of the Political Code, enacted in 1901,

1. Law vs. San Francisco, 144 Cal. 384, (1904).
2. Ex parte Lemon, 143 Cal. 558, (1904).
   Ex parte Helm, 143 Cal. 553, (1904).
   Ex parte Jackson, 143 Cal. 564, (1904).
3 Ex parte Braun, 141 Cal. 212-213, (1903).

provided that 'boards of supervisors of the counties of the state, and the legislative bodies of the incorporated cities and towns therein, shall, as herein provided for, and not otherwise, have power to license all and every kind of business not prohibited by law, etc.', is not applicable to a city governed by a charter framed under the constitution, where such charter confers upon its legislative body the power to impose and collect taxes for revenue purposes."

Removal of officers under a freeholders' charter is "conceded" to be a "'municipal affair' within meaning of section 6, Article XI., " though, says the court, "that cannot affect the concurrent jurisdiction of the superior court conferred upon it by a general law applicable to all municipal corporations however constituted."(1) This would seem to come dangerously bear to asserting the right of legislative interference, to some extent at least, in "municipal affairs" -- if accepted literally. No doubt, however, the court is here referring to other things than the removal of local municipal officers, such as penalties for malfeasance in office, and the like.

1. Coffey vs. Superior Court, 147 Cal. 545, (1905).

In re Pfahler, a leading case in the determination of the real significance of the amendment of 1896, likewise holds that direct legislation in the form of the initiative may be provided in a city charter,[1] likewise the referendum is a "municipal affair".

The state pension law as to municipal officers is superseded by a municipal provision on the same subject.[2] The language of the court is as follows: "The right of a widow of a police officer to compel the board, by writ of mandamus, to make payment to her, is measured solely by provisions of the charter, ... in effect January 1, 1900, and, created fund; and she has no rights under a preceding general pension law, in respect to which no mention is made in the charter."

"The chief of police is only a municipal officer, whose duties pertain to the city, and his removal is a 'municipal affair' that concerns only the municipality,"[3] are the words of the court, in Dinan vs. Superior Court. This would seem to apply to officers "whose duties pertain to the city" only. Rothschild vs. Bantel[4] holds that: "The provisions of that charter (San Francisco, 1899)

1. In re Pfahler, 150 Cal. 71, (1906).
2. Burke vs. Board of Trustees, 4 Cal. App. 235, (1906).
3. Dinan vs. Superior Court, 6 Cal. App. 217, (1907).
4. Rothschild vs. Bantel, 154 Cal. 5, (1907).

prohibiting certain uses of municipal moneys . . . . . relate solely to municipal affairs, and under the 'municipal affairs' amendment to section 6, Article XI., of the constitution of 1879, adopted in 1896, such provisions in a freeholders' charter are paramount to any law enacted by the state legislature, and the legislature is without power to enact any law infringing thereon."

Turning to another case,[1] we read: "The effect of subdivision 1, section 8 1/2, Article XI., as amended in 1906, was to make the matter of such police courts purely a 'municipal affair', as to any city having a freeholders' charter which subsequently made appropriate provisions in its charter for such courts." The court continues: "As to such matters as the constitution authorizes to be provided for in freeholders' charters, the provisions of the charter are supreme, under section 6, Article XI., of the constitution, superseding all laws inconsistent therewith, and being exempt from any control by any subsequent act of the legislature."

In 1908 several cases were decided giving to cities additional "municipal affairs".[2] One, held that charter

1. Graham vs. Mayor, etc. of Fresno, 151 Cal. 465, (1907).
2. South Pasadena vs. Pasadena L.& W. Co. 152 Cal. 579,(1908).

provisions as to supplying of water to outside territory, being necessarily a matter incidental to the main purpose of supplying water to its own inhabitants, is a 'municipal affair' of the city of Pasadena within the meaning of section 6, Article XI., and the charter or provisions relating thereto prevail over general laws, if inconsistent therewith."

A second case decided the same year holds "As respects prosecutions for violations of the city charter and city ordinances, the regulation by the city thereof is a 'municipal affair' . . . . ., and when the city charter regulates that matter, the charter must control a general statute."(1). The following year seems void of decisions upon this point.

Dudley vs. Superior Court,(2) holds that: "The election of a mayor under a freeholders' charter is a municipal affair, and if a contest were provided thereunder, it would be a municipal affair . . . . . ".

The most prolific year, since the adoption of the amendment of 1896, has been 1911. No less than five decisions on municipal affairs were handed down. "Supplying

1. Fleming vs. Hause, 153 Cal. 162, (1908).
   See also In re Diehl, 8 Cal. App. 51.
2. Dudley vs. Superior Court, 13 Cal. App. 271, (1911).

electricity for motive power is a public service in which municipal corporations may engage," says the court in Clark vs. Los Angeles.(1) Another case(2) holds compensation of a municipal officer to be a "municipal affair", particular reference being made to reporters of the police courts. Later in the year it was said:(3) "The tenure of municipal officers and the mode of removal of an elected city officer are purely 'municipal affairs', as to which the provisions of the state and federal constitutions have no application."(4) In Long vs. Boynton, the decision was to the effect that issuing bonds for completion and repair of existing wharves is a municipal affair to be governed by the provisions of the municipal charter, which is controlling.

Secondary uses of the streets by the maintenance therein of telegraph and telephone poles and wires is a municipal affair, subject to municipal decision as to such use, and to what extent.(5)

c. What affairs are not Municipal Affairs.

Turning, now, to those cases which have been held not to be "municipal affairs" within the meaning of section

1. Clark vs. Los Angeles, 160 Cal. 30, (1911).
2. Trefts vs. McDougald, 15 Cal. App. 584,(1911).
3. Dudley vs. Superior Court, 13 Cal. App. 271, (1911).
4. Long vs. Boynton, 17 Cal. App. 290, (1911).
5. Sunset Tel. & Tel. Co. vs. Pasadena, 161 Cal. 265.

6, Article XI., as amended in 1896, we find that they are by no means as numerous. The indication would seem to be that the courts are more closely in sympathy with the struggle for home rule than in Missouri, where the freeholders' charter idea was first put into operation. The California courts seem loath to decide against the municipality, unless necessary.

The first case of this nature arose over the attempt to annex territory to the city of Oakland.(1) The charter provision was in conflict with the general law, and it was decided that the general law superseded a charter provision in regard to the matter. The court rendered its decision, on this point, in these words: "The provision of Article XI., section 6, as amended in 1896, exempting the control of 'municipal affairs' from the operation of general laws, does not operate to prevent the annexation of territory to a municipal corporation under the provisions of an act of the legislature. . . . . ." Later in the same year, in the case of Fragley vs. Phelan,(2) the court indicated that the establishment of a municipality was a matter of state concern, and so governed by general laws

1. People vs. Oakland, 123 Cal. 598, (1899).
2. Fragley vs. Phelan, 126 Cal. 383, (1899).

only. The words of the court are: "it seems that the creation of a charter is not essentially and alone a 'municipal affair'. It is a state affair." "The election of a board of freeholders to frame a charter, and the election at which a vote is to be had, to confirm the charter, are not 'municipal affairs' within the meaning of the exception to section 6, Article XI., and such elections may be subject to and controlled by a general law."

No further case adverse to the municipality is found until 1903. In that year the courts, and criminal cases, and also the school system, are placed in the category of "state affairs".

The case of Jackson vs. Baehr,(1) says: "It is sufficient in answer to this to say that the superior courts are state courts, and criminal cases concern the state and are 'state affairs'."

"A city charter adopted under the provisions of the constitution has no effect whatever upon the existence or legal character of a school district formed under general law. The school system is a matter of general concern, and not a 'municipal affair'."

1. Jackson vs. Baehr. 138 Cal. 268, (1903).

In connection with the judicial system, 1905, yields two cases. One says: "The jurisdiction of offences defined by state law must be regulated by state law, and cannot be altered or qualified by any provision of a free-holders' charter."(1) The other, arising from the disposition of fines for misdemeanors under state law, uses these words: "(this) is not a 'municipal affair' under a special charter which says nothing about fines, and leaves their disposition to be regulated by the Penal Code."(2) The language of the court seems to indicate that, in case the matter had been provided for differently in the charter, a different decision would have been rendered. In absence of further decisions on this particular point, it is difficult to generalize, however.

The question of annexation of territory comes up again in 1908, in the case of People vs. Los Angeles.(3) The language of the decision is unmistakably a reiteration of the first opinion on this point. "Annexation of territory to a municipality is not a 'municipal affair', as that term is used in the constitution, and the proceedings thereon, including all matters appertaining to the

1. Jackson vs. Baer, 138 Cal. 266, 270, (1905).
2. Marysville vs. Yuba County, 1 Cal. App. 628, (1905).
3. People vs. Los Angeles, 154 Cal. 220, (1908).

special election to determine the question, and the time and form of notice thereof, are controlled by the general act of March 19, 1899, and not by conflicting provisions of the charter of the municipality to which the annexation is to be had."

In the case of People vs. Long Beach,(1) decided the following year, almost exactly the same words are used.

"School districts in this state are quasi-municipal public corporations," says the court in School District vs. School District,(2) "and subject to such constitutional limitations as may exist, the power of the legislature over them is plenary". Matters pertaining to them are "state" and not "municipal" affairs, evidently. A third case in the same year(3) referring to the judicial system, reiterates the principle of former decisions in these words: "While charter powers cannot be exercised so as to conflict with general laws, with the exception of 'municipal affairs', that term, as used in the constitution, cannot include the licensing of forms of vice and crime which are both mala in se and mala prohibita."

Regarding a rather far-fetched plea on the part of

1. People vs. Long Beach, 155 Cal. 604, (1909).
2. School District vs. School District, 156 Cal.416,(1909).
3. Farmer vs. Behmer, 9 Cal. App. 773, (1909).

of the plaintiff in the case of May vs. Craig,[1] the court has this to say: "The construction of improvements upon private property within a charter city is not a 'municipal affair'. The city has no interest therein, or control thereof, except such control as is made necessary for the protection of the public welfare."

The "county" affairs of a consolidated city and county are "state" affairs as distinguished from purely municipal concerns.[2] A glance at the words of the court clearly indicate this.

"The provision of the constitution excepting 'municipal affairs' from the general legislative power over municipalities is to be construed as relating wholly to cities and towns exercising municipal functions. It only applies to San Francisco so far as it exercises 'municipal functions' as distinguished from a county. With respect to the powers and functions of a county exercised by San Francisco, that section has no concern; and the power of the legislature to enact general laws for the government of counties as such, including San Francisco, remains unaffected and unimpaired by that section."

1. Mays vs. Craig, 13 Cal. App. 368, (1910).
2. Nicholl vs. Koster, 157 Cal. 416, (1910).

One of the interesting questions arising out of the amendment of 1896, to section 6, was its effect "on pre-existing charter provisions", says Professor W.C. Jones,[1] of the University of California Law School.

Byrne vs. Drain,[2] decided in 1900, contains the statement that "where a charter provision was valid when adopted, but was subsequently superseded by a general law, the charter provision was revived by the constitutional amendment."[3] But, "where the charter provision was invalid when passed, because of conflict with a general law, no effect was given to the charter provision by the amendment."[4]

Banaz vs. Smith,[5] (1901) says: "The provisions of the freeholders' charter of Los Angeles, adopted in 1899, so far as then conflicting with the Vrooman Act, were annulled thereby; and being void from the beginning, were not revived by the amendment to section 6, Article XI., adopted in 1896. A constitutional amendment not expressly so providing could not have the effect of enacting laws."

B. Proposed Amendment.

Section 6, despite the "municipal affairs", amend-

1. 1 Cal. L.R. 143.
2. Byrne vs. Drain, 127 Cal. 663, (1900).
3. 1 Cal. L.R. 143.
4. Ibid.,143.
5. Banaz vs. Smith, 133 Cal. 102, (1901).
   See also German Savings and Loan Society vs. Hamish, 138 Cal. 120, (1902).
   Ex parte Sweetman, 5 Cal.App. 577, (1907).
   Postal Tel. & Tel. Co.vs.Los Angeles, 160 Cal.189,(1911).

ment of 1896, is still unsatisfactory.For, while cities operating under a freeholders' charter are free from the operation of general laws in purely municipal affairs, yet there still remains the necessity of judicial interprétations of charter provisions to determine whether or not they relate to such "municipal affairs". This necessity, of course, will always remain but the court has said that the inclusion of such "affairs" is only "permissive". The big problem now lies in securing charter-makers who are far sighted, and keen, enough to anticipate the ruling of the court, The result, if successful, would mean a great bulky charter, full of minute details.

The problem for the future, then, is in securing such a statement in the constitution that will give cities a general grant of powers in this connection. Thus, a decision of the court which adds a "municipal affair" to the charter of one city, should automatically add that same power to all other freeholders' charters-ex propre vigore- from the fact that it is a freeholders' charter. This would mean a larger measure of home rule, and would not deprive that state of its sum total of power over

freeholders' charter cities as a whole.

The settled interpretation of the court, in regard to the phrase "except in municipal affairs" is that a municipality may claim in its charter, certain specified "municipal affairs", But, the charter must be explicit in claiming this "affair" in order to take advantage of this constitutional permission.

To meet this situation and secure to freeholders' charter cities the fullest measure of home rule in strictly local affairs we find the proposed Assembly Constitutional Amendment No. 81, of the session of 1913, which passed both houses and was submitted to the people. This proposed amendment rewords section 6, Article XI. to read as follows:

"Cities and towns hereafter organized under charters framed and adopted by authority of this constitution are hereby empowered, and cities and towns heretofore organized by authority of this constitution may amend their charters in the manner authorized by this constitution so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to

municipal affairs, subject only to the restrictions and limits provided in their several charters, and in respect to other matters they should be subject to and controlled by general rules.

Here is a provision which exactly meets the necessities of the case by positively providing, in certain matters, a general grant of powers. It is a valuable addition to American municipal law, not only because it tends to grant a larger measure of home rule to certain California cities than is to be found elsewhere, but, also, because it is a general grant of power.

This proposed amendment is not included in the latest copies of the California Constitution, so it is evident that it failed of adoption.

IV. DECISIONS ON THE OTHER LEADING SECTIONS.

A. DECISIONS BEARING ON SECTION EIGHT.

All four of the charters approved by the legislature in 1889 were adopted by joint resolution.(1) A case soon came before the Supreme Court calling in question the legality of the Los Angeles charter, so ratified.(2) It was maintained that the Governor should in such a case, as with laws, have the power to veto. The action was a petition by one Brooks for a writ of prohibition to prevent Fischer from acting as assessor of Los Angeles "because the charter of the city is not legal, and inconsistent with general laws." The court denied the writ, saying "under section 8, Article XI., a city charter may be approved by a majority vote of the members elected to each House of the legislature, without the concurrence of the governor." Continuing, the court laid down the rule the "The legislature is not synonymous with the law-making power, and does not include the governor except as applied to the making of laws. The legislature, as a distinct body, consists of

1. Oberholtzer, Home Rule in Annals of American Academy, 68-95. (1893)
2. Brooks vs. Fischer, 79 Cal. 173- 1889.

the senate and assembly, and is empowered by the constitution to act as a distinct body with reference to approval of city charters."

It was laid down that a whole charter is not invalid because a few provisions are.

The legislature of that year submitted an amendment, noted above, providing for ratification of charters by concurrent resolutions, which was adopted by the people.(1)

The following year a case came before the court which, while it was decided on the basis of the provisions in section 6, is again reviewed here,(2) because it led to an amendment to section 8. The case arose out of a question of the powers possessed by the legislature over a city after it had framed and adopted its own charter. This was the case of Davies v. Los Angeles. The legislature had passed a general law concerning the opening and widening of streets,(3) It was contended that Los Angeles, since it had separate provisions in its charter on the same subject, was exempted from the operations of this law. The court held that this made no difference, that a special charter adopted by a

1. California Statutes, (1889) 340-343.
2. Davies vs. Los Angeles. 86 Cal. 37. (1890).
3. California Statutes, (1891) 533.

city under section 8, Article XI., is no exception to this rule(section 6, Article XI.,), any special provisions of such charter in conflict with general laws passed after its adoption being superseded by such general laws.

People vs. Bagley (1) laid down in 1890 the general rule that municipal corporations were subject to general laws. It was construed as not tp prevent a change from a charter framed under the general act of March 13, 1883 to a special charter a dopted pursuant to section 8, Article XI. This, however , was really no great concession.

Another case (2) in the same year again struck at home rule and turned on the provision of the Los Angeles charter of 1889, establishing a police court. The court stated the question thus:"The question now before us is whether an inferior court can be established by a mere resolution of the legislature not acted upon by the Governor, because such court has been provided for in a charter adopted as provided by section 8, Article XI., of the constitution."

1.People vs. Bagley, 85 Cal. 343,(1890).
2. People vs. Toal, 85 Cal. 333,(1890).

After stating, in the words of section 1, Article VI., that such courts must be established " by laws" the court said :"Section 8, Article XI., does not, and was not intended to change or in any way alter the specific provisions relating to courts."

The legislature, seeing the evident intention of the constitutional convention thus defeated, proposed an amendment,[1] to section 8, March 19, 1891, which was adopted Nov. 8, 1892. This amendment provided that the charter of a city, "shall become the organic law thereof and supersede any existing charter and all amendments thereof and all laws inconsistent with such charter." Previously, the section had provided "and shall supersede any existing charter and all amendments thereof and all special laws inconsistent with such charter."

This had no effect, obviously, on general laws passed after the adoption of a charter, which was the point aimed at by the amendment. The defect of the constitution on this point was later met by the "municipal affairs" amendment to section 6, in 1896.

1. California Statutes,(1891), 533.

Continuing its unfriendly attitude toward freeholders' charters, the court laid down in 1893, (1) that while such a charter may only be amended "at intervals of not less than two years, by proposals therefor submitted by the legislative authority of the city of the qualified electors," this does not inhibit amendment or change within the two years by general law. The action arose over a law of March 19, 1889, and the subsequent organization of the territory so excluded, under general law as the City of Coronado . It was contended that the exclusion was unlawful as a change of the charter inhibited by section 8 as quoted above. Therefore, the organization of Coronado was contended to be invalidated.

In a decision relating to freeholders under section 8, Article XI., the court said (2) "Though two of the fifteen freeholders, who have been elected to frame a charter for a city are ineligible, the remaining thirteen members, if regularly elected, constitute a legal board, with authority to act in the matter of framing

1. People vs. Coronado, 100 Cal. 571, (1893).
2. People ex rel Hoffman vs. Hecht, 105 Cal. 621, 627.

a charter."

It is interesting to speculate on the extent to which the court would sustain this decision in case a majority of the freeholders were ineligible, due, let us say, to the corrupt influence of certain elements in control of city politics.

A case decided in 1896 (1) held that the "special election" provided for in section 8, Article XI., at which amendments to a municipal charter may be adopted is an election "held for special purpose of voting upon the amendments to the charter."

Three years later the effect of the freeholders' charter of San Francisco, under section 8, Article XI., as amended, was held to be an invalidation of all laws inconsistent therewith (2), whether special or general.

Some years later (3) the court said that a freeholders' charter can be changed only by amendment submitted by the legislative authority of the city to be voted on at an election held for that purpose. The result was the amendment of 1901 (4) providing for a petition of

1. People vs. Davie, 114 Cal. 363, (1896).
2. Martin vs. Bd. of Election Comrs. 126 Cal. 404, (1899).
3. Blanchard vs. Hartwell, 62 Pac. 509, (1899).
4. California Statutes, (1901), 951.

the qualified voters to the legislative authority of the city for the submission of any proposed amendments, Upon receiving such petition the legislative authority of the city was required to submit the same.

A decision rendered in 1905 declares the legislative power over city charters to be limited to rejection or approval.(1) In re Pfahler,(2) already cited in another connection held that the words "legislative authority" in section 8, Article XI., as to proposed amendments to freeholders' charters, was not intended to define the powers of that body or place it in a position where it would be beyond restrictions by the organic law of the city.

"If," says the court,(3) "by approval, under section 8, Article XI., of a charter, or an amendment, which vests in a local body authority to legislate concerning local matters the legislature may be said to be delegating legislative power, such delegation is one that is expressly authorized by the constitution."

1. Sheehan vs. Scott, 145 Cal. 684,(1905).
2. In re Pfahler, 150 Cal. 71, (1906).
3. Mardis vs. McCarthy, 162 Cal. 94, (1912).

B. DECISIONS ON SECTION EIGHT AND ONE-HALF.

Senate Constitutional Amendment, Number 13, (1895), proposed the addition to Article XI., of a new section, 8 1/2, providing for police courts, boards of education, police commissioners, boards of election, etc., in free-holders' charter cities.(1) It was adopted Nov. 13, 1896. The section reads thus:

"It shall be competent in all charters framed under the authority given by section 8, of Article XI., of this constitution to provide in addition to those provisions allowable by this constitution and by the laws of the state, as follows:

1. For the constitution, regulation, government, and jurisdiction of police courts and for the manner in which, times at which, and the terms for which, the judges of such courts shall be elected or appointed, and for the qualifications and compensation of said judges and of their clerks and attaches.

2. For the manner in which, the times at which, and the terms for which the members of boards

1. California Statutes, (1895), 450.

of education shall be elected or appointed, for their qualifications and compensation or removal and for the number which shall constitute any one of such boards.

3. For the manner in which, the times at which, and the terms for which, the members of the boards of police commissioners shall be elected or appointed and for the constitution, regulation, compensation, and government of such boards and of the municipal police courts.

4.For the manner in which, and the time at which any municipal elections shall be held and the result thereof determined; for the manner in which, the time at which, and the terms for which, the members of all boards of election shall be elected or appointed and for the constitution, regulation, compensation, and government of such boards and of their clerks and attaches, and for all expenses incident to the holding of any election.

Where a city and county has been merged and consolidated into one municipal government, it shall also be competent in any charter framed under said section 8, Article XI., or by amendment thereto, to provide for the manner in which and times at which the several county and municipal

officers and employees whose compensation is paid by such city and county, excepting the judges of the superior court, shall be elected or appointed, and for their recall and removal, and for their compensation and for the number of deputies, clerks and other employees that each shall have and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees. All provisions of any charters of any such consolidated city and county heretofore adopted and amendments thereto, which are in accordance herewith, are hereby confirmed and declared valid. (Amendment adopted October 10, 1911)."

One of the first cases under this new section, was decided by the court in 1898.(1) This was a case brought under habeas corpus proceedings to test the jurisdiction of the Police Court of the city of Sacramento to convict of misdemeanor. The charter, adopted in 1894, prior to the adoption of section 8 1/2 provided for a police court, a provision also found in its former special legislative charter. The court said,"A police court could

1. Ex parte Sparks 120 Cal. 395 (1898).

not be created or continued under the new charter of the city of Sacramento, by the mere approval of the legislature of a freeholders' charter that had been adopted by the municipality, such approval not having any effect of operation as an act of the legislature, which did not frame or pass the law. Then turning to section 8 1/2, Article XI., the court said: "The amendment of 1896 .. of the constitution adding section 8 1/2, in which it declared that it is competent for freeholders' charters to provide for police courts and fix their jurisdiction, is not retrospective but prospective in its nature as being a grant of authority, and has no application to charters previously adopted." (1)

Ex parte Dolan arose out of a provision in the Santa Barbara charter giving the police court, established according to section 8 1/2, exclusive jurisdiction over certain misdemeanors. The decision declared that the charter had no constitutional authority to make such an "exclusive" grant, and added that "a justices' court, whose jurisdiction included the corporate limits of the

1. Ex parte Dolan, 128 Cal. 460, (1900).

city, has concurrent jurisdiction with the police court over such jurisdiction upon justices' courts." It added:"A mere grant of jurisdiction is not impliedly exclusive, and concurrent grants of jurisdiction to distinct courts confer concurrent powers upon each."

A freeholders' charter cannot confer upon a police court, established under section 8 1/2, concurrent jurisdiction in criminal libel cases, according to a decision rendered in 1905.(1) The words of the court are these: "Under constitutional provision, section 5, Article XI., it is evident that the jurisdiction conferred upon the superior court in cases of misdemeanors is exercised by it exclusively or not at all . It is a provisional jurisdiction which, however, must be exercised solely by that court until the legislature or some equally competent authority has provided for its exercise by some inferior court. And as it must possess original jurisdiction in the absence of any transfer of jurisdiction to an inferior court, and loses its jurisdiction entirely by the transfer, it is clear that it cannot have concurrent jurisdiction with any other court in any case of disdemeanor." This involves a reference

1. Robert vs. Police Court, 148 Cal. 131, (1905).

to an earlier case, Green vs. Superior Court.[1]

Two years later the court held[2] that the provisions of subdivision 1, section 8 1/2, Article XI., being limited in terms to police courts, do not restrict in the slightest degree the power of the legislature to provide for justices' courts in cities and towns, as part of the general state system of justices' courts.

Fleming vs. Hance,[3] held that the grant made in section 8 1/2 of the constitution is merely permissive. If the city has not used such permission, the legislature is not inhibited from acting as if the provisions were not present in the constitution.

The effect of this section, then,[4] is to make the matter of such police courts purely a "municipal affair" as to any city having a freeholders' charter, which subsequently made appropiate provisions in its charter for such courts.

C. DECISIONS BEARING ON SECTION ELEVEN.

One of the most vital and disputed points in connection with the interpretation of Article XI., is that

1. Green vs. Superior Court, 78 Cal. 556.
2. Graham vs. Mayor, etc., of Fresno, 151 Cal. 465, (1907).
3. Fleming vs. Hance, 153 Cal. 162, (1908).
4. Graham vs. Mayor, etc., of Fresno, 151 Cal. 465, (1907).

of the relationship between section 11 and section 6, Section XI. Section 11 reads: "Any county, city, town, or township, may make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws."

The last clause of Section 6 reads: "and cities and towns heretofore and hereafter organized and all charters thereof framed or adopted by authority of this constitution, except in municipal affairs, shall be subject to and controlled by general laws."

The question immediately and naturally arises whether or not such regulations as section 11 permits could not be brought under the exception of Section 6, by explicit provision in the charter, and thus add considerably to the "municipal affairs" of freeholders' charter cities.

In Ex parte Braun,(1) the phrase "except in municipal affairs" has been held to be permissive in its nature, giving to the charter - makers the right to include in their charter "all powers appropiate for a municipality to possess." The implication seems clear enough, that thus these "regulations" may be placed beyond the

1. Ex parte Braun, 141 Cal. 204, (1903).

danger of supersession by general laws.

This issue seems never to have been clearly and definitely raised. In only one case has any approach to it been reached.(1) It was held that an ordinance licensing an act which is a crime under general laws, a crime mala in se and mala prohibita, is not authorized by the charter of the city, and so it not a "municipal affair." This case would hardly stand in the way of a police regulation explicitly provided for, in a city charter, however.

In re Diehl,(2) says" "Section 3366, of the Penal Code, limiting licenses to the purpose of regulation, has no application to freeholders' charters, established under section 6, Article XI," thereby, it seems to the writer, recognizing the right of such a charter to make provisions based on the peculiar needs of the community. Why cannot these provisions, by specific enumeration in the charter, become "municipal affairs"?

The importance of securing a sound basis for assuming that such regulation would be declared "municipal affairs" would be greatly enhanced by the passage of such an amendment to section 6 as has been already suggested.

1. Farmer vs. Behmer, 9 Cal. App. 773, (1909).
2. In re Diehl, 8 Cal. App. 51.

Several cases have ~~been~~ arisen in which section 11, by itself, has been interpreted.

The court in In re Guerrero,[1] laid down the decision that a municipal corporation has power to impose licenses for carrying on business, or for revenue, or for both, under section 11, Article XI. of the constitution. The court said, in connection with the effect of the constitution on existing municipalities ". . . . . it conferred upon all existing municipalities the power to make and administer, within their respective limits, all such local, police, sanitary and other laws as are not in conflict with the general laws of the state."

A case, in the following year[2] calls section 11 a "charter for each county, city, town and township so far as its local regulations are concerned; and nothing less than positive and general laws upon the same subject can be said to create conflict within the meaning of this section." A local liquor license was declared constitutional.

A later case[3] emphasized the necessity of keeping such regulations out of conflict with general laws,

1. In re Guerrero, 69 Cal. 88, (1886).
2. Ex parte Campbell, 74 Cal. 20, (1887).
3. Ex parte Braun, 141 Cal. 204, (1903).

otherwise they are invalid.

Cemetary Association vs. San Francisco,[1] decided in 1903, that an ordinance of San Francisco, prohibiting interment of dead bodies within city limits, exclusive of those portions belonging to the United States under a penalty for violation of its provisions, is a valid exercise of the police power of the city vested in it by section 11., Article XI.

A municipality, in the exercise of its police powers, may by ordinance, establish fire limits, says the court.[2] This police power "is derived from Article XI, section 11, and not alone from its charter."

In re Desanta,[3] decided in 1908, holds that conflict with a general law on the same subject is avoided by ordinances passed in pursuance of section 11, Article XI.

Most of the cases concerning section 11 will be found to arise under the power of taxation,[4] the use of public money and property,[5] and the exercise of purely administrative functions of the city.[6]

D. Decisions bearing on Section 13.

Section 13, Article XI, reads as follows: "The

1. Cemetary Association vs. San Francisco, 140 Cal.226,(1903).
2. In re Newell, 140 Cal. 226, (1903).
3. In re Desanta, 8 Cal. App. 295, (1908).
4. Ex parte Helm, 143 Cal. 553, (1904).
5. Popper vs. Broderick, 123 Cal. 456, (1899).
   Sunset Co., vs. Pasadena, 161 Cal. 265, (1911).
6. Morton vs. Broderick, 118 Cal. 474, (1897).

legislature shall not delegate to any special commission, private corporation, company, association or individual, any power to make, control, appropriate, supervise, or in any way interfere with any county, city, town or municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal function whatever".

The case of In re Pfahler (1) arose out of a habeas corpus proceeding to the Chief of Police of Los Angeles. Pfahler was held for slaughtering outside certain prescribed limits as provided by ordinance. He claimed that the ordinance was never legally enacted because enacted by initiative under a charter provision. It was contended that this was a delegation to a "special commission". The court said, "The initiative and referendum by the people is not within the provision of section 13, Article XI. of the constitution, prohibiting the delegation of power to a "special commission" to perform any municipal function. The aggregate body of qualified electors cannot under our constitution be held to be a 'special commission' within the meaning of that provision".

1. In re Pfahler, 150 Cal. 71, (1906).

A case decided somewhat earlier than this had held[1] that the determination of the boundaries of territory to be annexed is not a "municipal function" within section 13, Article XI. and may be left to the electors of the locality to be affected or some legislative body.

In 1891,[2] a taxpayer of the city of Los Angeles brought an action against the city treasurer and a bank, to enjoin the deposit of public moneys of the city, which deposit had been provided by section 44 of the city charter.

The court held "Section 13, Article XI..... forbids the delegation of power to a municipal corporation to do what the legislature is forbidden to do, there being no such power of delegation expressly conferred by the constitution".

E. Decisions bearing on Section 18.

The principle of section 18 is very strictly followed out in the decisions. This is a prohibition on spending more money during a year than the income of the city allows. Cities too, it seems, have a habit of "drawing" money in advance of pay day.

The rigor of the provision was somewhat lessened when

1. People vs. Town of Ontario, 148 Cal. 625.
2. Yarnell vs. Los Angeles, 87 Cal. 603, (1891).

the court, in 1891,[1] held that section 18, Article XI limiting municipal corporation indebtednesses applied only to those mentioned therein.

Montague vs. English[2] held that, under the constitutional provision that each year's revenue of a municipality must pay each year's indebtedness, a claimant against a municipality is bound to look for the satisfaction of his claim to that year's income and "only there." Taking this in connection with another case,[3] Conlin vs. Board of Supervisors, which says: "nor (can the legislature) pass a special or local law directing money to be paid to any individual out of the funds of a particular municipality whether the payment be in satisfaction of an enforcable obligation or not," we find an interesting situation. Perhaps few people will be muloted of legitimate claims, yet the number of cases on the point first raised makes one fear that cities are not above this sort of thing.

F. Decisions bearing on Section Nineteen.

The matter, of transcendent importance to municipalities the whole country over, is the public utility franchise question. The situation in California, since

1. Re Bonds Madera Irr. Dist., 92 Cal. 296, (1891).
2. Montague vs. English, 119 Cal. 225,228.
   See also Higgins vs. San Diego, 131 Cal. 294,305.
   San Fran. Gas. Co.vs. Brickwedel, 62 Cal.641,642.
   Mac Gowan vs. Ford, 107 Cal. 177,186.
   McBean vs. Fresno, 112 Cal. 159, 164.
3. Conlin vs. Board of Supervisors, 114 Cal. 404, (1896).

the adoption of the Constitution of 1879, had up to Oct. 11, 1911, presented a peculiar aspect. Up to that date Section 19, Article XI., provided that "any individual or company duly incorporated for such purpose . . . . shall have the privilege of using the public streets or thoroughfares" of cities, for the purpose of laying mains or erecting poles or wires, for water and light distribution. This privilege was subject only to the right of the city to regulate service rates and damages. The Supreme Court of California has uniformly held this section to be a direct grant of power[1] to the public service company, whereby it might, without legislative or municipal sanction install in the city streets its poles and wires, or its gas and water mains. This right, when acted upon, constituted a franchise,[2] real property[3] of the nature of an easement in the public streets,[4] with which a city or town could not interfere by imposing additional burdens. In other words, a public utility company could pick out a prosperous city to operate in, lay its mains or raise its poles in the streets, whether the city favored the plan or not. Under this sort of a

1. People vs. Stephens, 62 Cal. 209, (1882).
2. In re Johston, 137 Cal. 115 (1902).
3. So. Pas. vs. Pas., 152 Cal. 586, (1908).
4. Stockton Gas & Elect. Co. vs. San Joaquin Co. 148 Cal. 313, (1905).

The University of Minnesota
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DEPARTMENT OF POLITICAL SCIENCE

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June 3, 1915 -

My dear Dean Ford,

Prof. Gray has not signed Mr. Hansen's thesis, he agreed to approve the thesis when Mr. Hansen had rewritten it to conform to the requirements of the department. Prof. Rusk and I were appointed a sub-committee to pass on the question of its final form. We have approved it. Sincerely

provision what was to stop a company from stepping in after the city built its own water or gas plant?

But, in Oct. 1911, the section was so changed as to declare that all public utilities may be established and operated "upon such conditions and under such regulations as the municipality may prescribe under its organic law." And the Supreme Court has given full effect to the letter and spirit of the section as amended, by ruling[1] that it places the entire subject of public utilities, in relation to franchises and otherwise within the control of the various municipal corporations under the charter power. Construing the key phrase "upon such conditions" to mean something wider than the ordinary police regulations, the court denied a gas company the right of laying mains in new streets until it should obtain a franchise and the permission of the Board of Public Works, under the ordinances of the city of Los Angeles. Water and lighting companies, under this decision, have a vested right to franchises in those streets only which were occupied at the date of the amendment. The decision established the principle of local control of franchises of public

1. In re Russell, 44 Cal. Dec. 352, (1912).

utilities wherever a right has not already vested. This is virtually a constitutional declaration that these matters are "municipal affairs", and operates similarly, but even more directly than section 11, Article XI.

The court refers approvingly to the opinion of Mr. Justice Holmes in Pomona Telephone Co. Case[1] decided Apr.18,1912, in which the same interpretation of section 19,as amended was enunciated. In that case, where a city threatened to remove from its streets the poles and wires of a local telephone company, in order to force it to obtain a local franchise, an injunction refused by the Circuit Court,[2] but granted by the Circuit Court of Appeals,[3] was dissolved by the Supreme Court of the United States.

As section 19, before amended, referred only to water and lighting companies, and as no statutory franchise existed, telephone companies could have no right to use the streets except such as they might obtain from the city.

In a more recent case,[4] the District Court of Appeals for the First District has carried the doctrine of the Russell case a long step further, with unexpected

1. Pomona Telephone Case, 224 U.S. 330, (1912).
2. Sunset Tel. & Tel. Co. vs.Pomona, 164 Fed.561,(1907).
3. Ibid., 172 Fed.829,(1909).
4. Lukrawa vs. Spring Valley Water Co.15 Cal.App. Dec.793, (1912).

results, in Lukrawa vs. Spring Valley Water Company. The company had refused to serve a group of residents in an out-of-the-way section of San Francisco. They applied for a writ of mandamus directing the water company to extend its mains so as to reach them. This was denied. The court admitted that it could ordinarily mandamus a public service corporation to extend its facilities so as to serve a consumer within the field it had undertaken to serve.(1) It held that the field of service of the company was the whole of San Francisco; but, it said, in view of the decision in the Russell Case, that the company must secure a franchise from the city before it could extend its mains to the applicants, the court did not feel that it could mandamus the company to do so, because the question of granting it was a matter lying wholly in the discretion of the city.

A reviewer of this case(2) says: "To thus thwart the will and interest of a section of the city's inhabitants is a strange working out of an amendment devised to permit the popular control of public utilities. But if the doctrine is right the result will be still more far

1. (a) Wyman on Publ.Service Corps. 793.
   (b) Haugen vs. Albine L. & W.Co.,21 Ore. 511, (1891).
   (c) People vs. Suburban W.Co. 58 N.Y.Supp.365,(1899).
2. R.W.M. in 1 Cal. L.R. .283-286.

reaching. The charter of San Francisco makes no provision for granting franchises to water and gas companies to use the streets; for the charter was framed with a view to Section 19, Article XI., as it stood prior to 1911, under which such companies had a state franchise to use the streets. This would, if the granting of the franchise is essential, mean that San Francisco cannot, if it so desires, grant the application of such companies to extend their mains, until either the charter or the constitution are amended, for a city's power to grant franchises is limited by the terms of its charter and the general laws. The Franchise Act of 1905,(1) and the Political Code, Sections 4410-4414 cannot apply, because under section 19, Article XI., they could not, when made, constitutionally include such utilities, and their operation cannot be extended by a subsequent amendment of the constitution.(2)

The apparent result of this decision, if it is correct, is to prevent any extensions of service by gas and water companies in San Francisco or other cities having similar charters, during the period necessary to make an amendment to the constitution.

1. California Statutes, (1907), 777.
2. Banaz vs. Smith, 133 Cal. 102, (1901).

As a contract to this, a recent Minnesota decision[1] has held that where a court directs a public utility to serve, it impliedly directs it to procure any permits necessary to enable it to serve, Unless a franchise is an absolute prerequisite to service; - and the constitution is silent on the point, this case would seem directly in point.

CONCLUSION

No study of this nature is quite complete without an attempt to draw some conclusion therefrom.

The first thing that strikes one, of course, is the fact that in California, cities over 3,500 which have availed themselves of the right to frame a freeholders' charter are freer from legislative control than the cities of any other state. Not only does the Constitution place them in a preferred position with regard to "municipal affairs", but, the court is constantly adding to these "affairs." As yet, explicit reference to such an "affair" must be made in a charter, in order to free it from the operation of general laws.

The amendment to section 6, Article XI., submitted

1. State vs. Consumers Power Co., 137 N.W.1104,(Minn.) (1912).

in 1913, which would, in effect, make municipal affairs automatically a part of any freeholders' charter -- because it was such a charter - shows the tendency.

The tendency is toward less and less legislative control. As yet it has not gone very far. But, there is a danger lurking in too great local control, which was pointed out in the convention. Then, there really was no danger, later, there may be. And, this danger lies in the fact that, while the bonds of legislative control are gradually loosening, no other control is being substituted, and uncontrolled power is always dangerous.